Digest of United States Practice in International Law

2002

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Sally J. Cummins
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Editors

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Table of Contents

PREFACE xxi

INTRODUCTION xxiii

NOTE FROM THE EDITORS xxv

Chapter 1
NATIONALITY, CITIZENSHIP AND IMMIGRATION 1
A. NATIONALITY AND CITIZENSHIP 1
1. Effect of Dual Nationality on U.S. Security Clearance 1
2. Revocation of U.S. Citizenship 5
3. Child Citizenship Act 8
4. Citizenship Claim under former Section 320 INA 9
5. *In Vitro* Conception 10
B. PASSPORTS 11
1. Two-Parent Consent Requirement for Passport Issuance 11
a. Special court order 11
b. Exception where mother reclaiming children abducted by father 12
2. Denial of Passport for Non-Payment of Child Support 13
3. New Passport for Escaped U.S. Prisoner 16
4. Denial or Limitation of Passports 17
C. IMMIGRATION AND VISAS 18
1. Applicability of 1949 Convention on Road Traffic 18
2. Compliance with U.S.-Cuba Migration Accords: Report to Congress 20
3. Suspension of Entry: Zimbabwe 22
D. ASYLUM AND REFUGEE STATUS AND RELATED ISSUES 24
1. Vietnamese Montagnard Refugees in Cambodia 24
2. Haitian Refugees 25
3. U.S.-Canada Agreement Covering Third-Country Asylum Claims at the Border 31
4. North Korean Refugees 35

Chapter 2
CONSULAR AND JUDICIAL ASSISTANCE AND RELATED ISSUES 39
A. CONSULAR NOTIFICATION, ACCESS AND ASSISTANCE 39
1. Consular Notification and U.S. Criminal Prosecution 39
a. In U.S. courts: Javier Suarez Medina 39
b. Gerardo Valdez 45
2. Inter-American Commission on Human Rights: Case of Ramon Martinez Villareal 48
B. CHILDREN 52
1. International Child Abduction 52
a. Visa ineligibility for international child abduction 52
b. Definition of "custody" under Hague Convention on the Civil Aspects of International Child Abduction 54
c. International Parental Kidnapping Crime Act 56
(1) Constitutional challenge under Commerce Clause 56
(2) Constitutional challenge under the Fifth Amendment 58
2. Consular Assistance for Children 59

Chapter 3
INTERNATIONAL CRIMINAL LAW 61
A. EXTRADITION AND OTHER RENDITIONS, AND MUTUAL LEGAL ASSISTANCE 61
1. New Bilateral Extradition, Mutual Legal Assistance, and Stolen Vehicle Treaties 61
2. Other Rendition 77
3. Other Mutual Legal Assistance Issues 79
a. U.S.-Russia 79
b. American Institute in Taiwan-Taipei Economic and Cultural Representative Office in the United States 79
c. U.S.-Europol 80
B. INTERNATIONAL CRIMES 85
1. Terrorism 85
a. Foreign Terrorist Organizations 85
(1) Legal criteria for designations 85
(2) Litigation by designated FTOs 91
(3) Constitutionality of application in criminal law 93

b. Asset freezing under IEEPA and Executive Order 13224 94
(1) Applicability to entity chartered within the United States 94
(2) Constitutionality 98
c. Delisting designated entities 101
d. Terrorist exclusion list 102
e. Review of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, and its Protocol 104
f. Verdict in Libya terrorist case: Pan AM 103 111
g. Inter-American Convention against Terrorism 112
h. United States of America-ASEAN Joint Declaration for Cooperation To Combat International Terrorism 118
i. APEC leaders' statement 119
j. "Smart border" initiatives with Mexico and Canada 121
k. G8 Recommendations on Counter-Terrorism 121
2. Narcotrafficking 122
a. Modifications to U.S. narcotics certification process 122
(1) Temporary modification for 2002 122
(2) Permanent legislative change 124
b. International Narcotics Control Strategy Report 125
c. Money laundering 126
3. Jurisdiction in U.S. Courts 131
a. Crime occurring in Mexican territorial waters 131
b. Crime occurring on high seas 133
(1) Violence against maritime navigation 133
(2) Maritime Drug Law Enforcement Act 134
C. INTERNATIONAL CRIMINAL TRIBUNALS 137
1. Ad Hoc Tribunals and Related Issues 137
a. International Criminal Tribunal for Rwanda 137
(1) Reward for information leading to the apprehension of Felicien Kabuga 137
(2) Rewards concerning persons associated with the Congo region 139
b. International Criminal Tribunal for Yugoslavia 142
(1) Anticipated conclusion of ICTY work 142
(2) Cooperation by Federal Republic of Yugoslavia 145
c. Sierra Leone 147
d. Extraordinary chambers in Cambodia 148

2. International Criminal Court 148
a. U.S. decision not to become party to Statue of Rome 148
(1) Notification of decision to UN 148
(2) Explanation of decision 149
b. UN Security Council Resolution 1422 157
(1) U.S. efforts to obtain protection 157
(2) Adoption of UN Security Council Resolution 1422 161
c. Bilateral agreements under Article 98 of the Rome Treaty 165
d. Congressional action 168
(1) American Servicemembers' Protection Act 168
(2) Understandings to treaties 174

Chapter 4
TREATY AFFAIRS 177
A. CAPACITY TO MAKE 177
B. CONCLUSION, ENTRY INTO FORCE, RESERVATIONS, APPLICATION, AND TERMINATION 177
1. Choice of Form: International Arms Control Agreements 177
2. Ratification of Protocols Where United States Not Party to Underlying Convention 183
3. Provisional Application through Memorandum of Understanding 186
4. Application to States of the United States 190
5. Termination 198
a. Litigation concerning role of U.S. Congress 198
b. Treaties terminated by the President 202
6. Reservation Practice: Iceland Whaling 206
C. ROLE IN LITIGATION 212
No Private Right of Action 212
a. Agreements between Mexico and the United States 212
b. U.S.-Iran Treaty of Amity, Economic Relations and Consular Rights 219

CHAPTER 5
FEDERAL FOREIGN AFFAIRS AUTHORITY 227
A. FOREIGN RELATIONS LAW OF THE UNITED STATES 227
1. Agreement with Russia Concerning Documentation of U.S.-Soviet Relations 227
2. Alienage Diversity Jurisdiction 227

3. Availability of Intelligence and Foreign Relations Information 231
4. Reciprocal Access to National Courts 236
5. Foreign Policy Issues in U.S. Legislation 242
6. American Institute in Taiwan 245
B. CONSTITUENT ENTITIES 246
Northern Mariana Islands: Control of "Submerged Lands" 246

Chapter 6
HUMAN RIGHTS 261
A. GENERAL 261
1. Country Reports on Human Rights Practices 261
2. Inter-American Commission on Human Rights: Authority to Adopt Precautionary Measures 261
3. Argentina Declassification Project 270
B. DISCRIMINATION 271
1. Race 271
a. Resolutions in Resumed 56th Session of UN General Assembly Third Committee 271
b. Resolutions in 57th Session of UN General Assembly 274
2. Gender 275
a. Women, peace, and security 275
b. Convention on the Elimination of All Forms of Discrimination Against Women 277
(1) U.S. domestic procedures 277
(2) UN resolutions 279
3. Religion 280
4. Persons with Disabilities 283
C. CHILDREN 285
1. U.S. Participation in Treaties Protecting Children 285
2. U.S. Ratification of Protocols to Convention on Rights of the Child 293
a. Children in Armed Conflict 294
Senate advice and consent 294
b. Sale of children, child prostitution, and child pornography 297
Senate advice and consent 297
3. Special Session of the UN General Assembly on Children 300
4. Rights of the Child 302
5. The Girl Child 304

D. ECONOMIC, SOCIAL AND CULTURAL ISSUES 304
1. Development 304
a. Right to development 304
b. Development initiatives 307
(1) Millennium Challenge Account 307
(2) G-8 Action Plan for Africa 307
(3) U.S.-Middle East Partnership Initiative 308
2. Abortion and Involuntary Sterilization 308
3. Right to Food 310
a. World Food Summit: five years later 310
b. UN General Assembly Resolution 57/226 311
4. Intangible Cultural Property 311
E. TORTURE 313
F. DETENTIONS 315
G. JUDICIAL PROCEDURE, PENALTIES AND RELATED ISSUES 316
1. Capital Punishment 316
2. References to International Criminal Court in Human Rights Resolutions 318
a. UN General Assembly Resolutions 318
(1) Extrajudicial, summary, or arbitrary executions 318
(2) Enforced or involuntary disappearances 320
(3) Other 320
b. Resolutions in Organization of American States General Assembly 321
3. Alien Tort Statute and Torture Victims Protection Act 323
a. Scope 324
(1) *Tachiona v. Mugabe* 324
(2) *Sarei v. Rio Tinto PLC* 333
(3) *Doe v. Unocal* 343
(4) *Flores v. Southern Peru Copper Corp.* 344
(5) *Abdullahi v. Pfizer, Inc.* 345
(6) Other Cases 346
b. Liability for indirect participation in human rights abuses 351
c. Forum non conveniens 355
d. Effect on U.S. foreign policy interests 357
H. INDIGENOUS PEOPLE 363
1. UN Economic and Social Council 363
2. Organization of American States 364

3. Inter-American Commission on Human Rights: Petition of Mary and Carrie Dann 367
I. RULE OF LAW AND DEMOCRACY PROMOTION 382
1. Community of Democracies 382
2. Hong Kong: Article 23 of the Basic Law 384
3. Democracy in Venezuela 385
J. TERRORISM 387

Chapter 7
INTERNATIONAL ORGANIZATIONS AND MULTILATERAL INSTITUTIONS 389
A. GENERAL 389
Enforcement of Obligations Under the Paris Convention for the Protection of Industrial Property 389
B. UNITED NATIONS 391
1. Report of the Special Committee on the Charter of the United Nations and on Strengthening of the Role of the Organization 391
2. Report of the International Law Commission 393
3. Reform and Payment of U.S. arrears 396
a. Modernizing UN management 396
b. U.S. legislation governing payment of arrears 398
C. UNITED NATIONS ORGANIZATIONS 403
1. United States Rejoins UNESCO 403
2. Observer Status at the World Health Organization: Taiwan 405

Chapter 8
INTERNATIONAL CLAIMS AND STATE RESPONSIBILITY 407
A. GOVERNMENT-TO-GOVERNMENT CLAIMS 407
Claims Against Iraq: United Nations Compensation Commission 407
B. CLAIMS OF INDIVIDUALS 408
1. Terrorist Victim Compensation 408
a. Proposed compensation fund for victims of terrorist attacks 408
b. Use of blocked assets for terrorist victims compensation 410
2. Claims by Vietnamese Employees 413
3. Claims by Victims of the Nazi Era and Victims' Heirs: Insurance Claims 415

a. Constitutionality of California Holocaust Victims Insurance Relief Act 415
b. Agreement concerning Holocaust era insurance claims 430
4. Claims by Persons Held as Prisoners of War by Japan 434
a. California state law 434
(1) American soldiers as prisoners of war: *Mitsubishi Materials Corp. v. Superior Court* 435
(2) Korean claimant: Taiheiyo Cement Corporation 440
b. Legislation to create federal cause of action 456
c. Applicability of statute of limitations in suit against the United States for Fifth Amendment taking 460
5. Other Claims Against the United States: Kenyan Claims from Embassy Bombing 461

Chapter 9
DIPLOMATIC RELATIONS, SUCCESSION AND CONTINUITY OF STATES 463
A. AFGHANISTAN 463
B. EAST TIMOR 463

Chapter 10
IMMUNITIES AND RELATED ISSUES 465
A. SOVEREIGN IMMUNITY 465
1. Scope of Application 466
a. Definition of foreign state 466
b. European Police Office 467
2. Suits Against Government Officials 469
a. *Doe v. Liu Qi*; *Plaintiff A v. Xia Deren* 469
b. *Kato v. Ishihara* 477
c. *Park v. Shin* 478
3. Agencies and Instrumentalities: Tiering and Timing 479
a. *In re Ski Train Fire* 479
b. *Dole Food Company v. Patrickson* 480
4. No Jus Cogens Exception to FSIA 491
a. *Boshnjaku v. Federal Republic of Yugoslavia* 491
b. *Garb v. Republic of Poland* 492

5. Retroactive Application of the FSIA 494
   a. *Hwang Gum Joo v. Japan* 494
   b. *In re Republic of Austria, Dorotheum GMBH & CO KG, and Osterreischische Industrieholding, AG* 503
   c. *Cruz v. U.S.* 511
   d. *Garb v. Republic of Poland* 513
6. Exceptions to Immunity 516
   a. Waiver 516
   b. Commercial activity 517
   c. Tort 522
   d. Acts of terrorism 522
      (1) *Roeder v. Islamic Republic of Iran* 523
      (2) *Weinstein v. Islamic Republic of Iran* 527
      (3) *Stethem v. Islamic Republic of Iran* 528
      (4) *Ungar v. Islamic Republic of Iran* 529
      (5) *Cronin v. Islamic Republic of Iran* 529
      (6) *Price v. Socialist People's Libyan Jamahiriya* 534
7. Effect of Tax Treaty under FSIA 534
8. Collection of Judgments 535
   a. *Jung Tang v. Chinese Cultural Center* 535
   b. *Flatow v. Islamic Republic of Iran* 545

B. HEAD OF STATE IMMUNITY 547
   1. *Wei Ye v. Jiang Zemin* 547
   2. *Rhanime v. Solomon* 552

C. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES 552
   1. *Ahmed v. Hoque* 552
   2. Vienna Convention on Diplomatic Relations: Saudi Arabian Embassy Documents 567

D. INTERNATIONAL ORGANIZATIONS 570
   1. Immunity from Suit of United Nations 570
   2. U.S. International Organizations and Immunities Act 572

E. THE ACT OF STATE DOCTRINE 573

F. OTHER ISSUES OF STATE REPRESENTATION 576
   1. Location of Diplomatic and Consular Buildings 576
   2. Real Property Taxes 576
      a. Libyan mission tax lien 576
      b. New York State transfer tax: Egyptian Mission 579
   3. Service of Process on Visiting Foreign Officials 581
      a. *Feng Suo Zhou v. Li Peng* 581
      b. *Wei Ye v. Jiang Zemin* 585

Chapter 11
TRADE, COMMERCIAL RELATIONS, INVESTMENT, AND TRANSPORTATION 597
A. TRANSPORTATION BY AIR 597
1. Bilateral Open Skies Agreements 597
a. New bilateral Open Skies agreements 597
b. European Court of Justice ruling 598
2. 1955 Hague Protocol 600
B. INTERNATIONAL CONVEYANCES 607
Presidential Permits 607
C. NORTH AMERICAN FREE TRADE AGREEMENT 607
1. Claims under Chapter 11 against the United States 607
a. Award in *Mondev International Ltd. v. United States* 607
(1) Relevance of pre-Nafta events 609
(2) Interpretation of NAFTA Article 1105(1) 611
b. Partial award in *Methanex Corporation v. United States* 616
c. *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* 623
d. *ADF Group Inc. v. United States* 641
(1) Rejoinder on Competence and Liability, March 29, 2002 642
(2) Post-Hearing Submission of June 27, 2002 648
(3) Post-Hearing Submission of August 1, 2002 659
2. Claim under Chapter 11 against Canada 661
3. State-to-State Arbitration under Chapter 20: Operation in the United States of Motor Carriers Owned or Controlled by Persons of Mexico 666
a. Presidential determination modifying moratorium 666
b. Litigation in U.S. courts 670
D. WORLD TRADE ORGANIZATION 670
1. WTO Cases Involving the United States 670
a. U.S. anti-subsidy law involving steel 670
b. Challenge to U.S. trademark provision 672
c. Foreign Sales Corporation Dispute 677
(1) Final Report of WTO Dispute Settlement Body 677
(2) Decision of the arbitrator on amount of sanctions 692
d. Establishment of panels related to safeguard measures on imports of certain steel products 693

(1) U.S. definitive safeguard measures on imports of certain steel products 693
(2) EC steel restrictions 697
2. U.S. Proposals in World Trade Organization Negotiations 697
a. Request for public comment 697
b. Proposals submitted to WTO 698
(1) Zero tariffs on all consumer and industrial products 698
(2) Agriculture 701
(3) Export Credits 707
(4) Transparency in WTO Dispute Settlement Proceedings 711
(5) U.S. moratorium on dispute settlement regarding medicines for HIV/AIDS and other health crises in absence of WTO consensus 715
E. OTHER TRADE AGREEMENTS AND RELATED ISSUES 719
1. Trade Promotion Authority 719
a. Legislation enacted 719
b. Agreements to be negotiated 722
c. Agreements to be concluded 723
d. Negotiation in progress: Free Trade Area of the Americas 724
2. U.S.-Cambodia Textile Agreement 725
F. OTHER ISSUES 726
1. Export-Import Bank Reauthorization Act of 2002 726
2. OECD Guidelines for Multinational Enterprises 727
3. Rough Diamonds: Kimberley Process Certification Scheme 728

Chapter 12
TERRITORIAL REGIMES AND RELATED ISSUES 731
A. LAW OF THE SEA AND RELATED ISSUES 731
1. United Nations Convention on Law of the Sea 731
2. Outer Limits of Extended Continental Shelf 732
3. Rights and Freedoms of International Community in Navigation 737
4. Litigation Concerning Submerged lands off the Coast of Alaska 738
a. Historical waters 739
b. Juridical bays 747
5. Prohibition on Alien Crewmen Performing Longshore Work 756

B. OTHER BORDER ISSUES: U.S.-MEXICO AGREEMENT ON DELIVERY OF RIO GRANDE WATER TO UNITED STATES 757
C. OUTER SPACE 759

Chapter 13
ENVIRONMENT AND OTHER TRANSNATIONAL SCIENTIFIC ISSUES 765
A. ENVIRONMENT 765
1. World Summit on Sustainable Development 765
a. U.S. goals for summit 766
b. U.S. interpretation of summit declaration 768
2. Pollution and Related Issues 771
a. Stockholm Convention on Persistent Organic Pollutants 771
(1) Transmittal to Senate for advice and consent to ratification 771
(2) Implementing legislation 777
b. Stratospheric ozone depletion 777
c. Climate change 777
(1) Clear skies and global climate change initiatives 777
(2) UN Framework Convention on Climate Change 781
d. Disposal of hazardous wastes 783
3. Protection of the Marine Environment and Marine Conservation 785
a. Oceans 785
b. Particularly Sensitive Sea Areas 788
c. South Pacific Regional Environment Programme Agreement 790
d. Marine wildlife 792
(1) Protocol to Amend 1949 Convention on Establishment of an Inter-American Tropical Tuna Commission 792
(2) 1990 Protocol Concerning Specially Protected Areas and Wildlife 792
(3) Dolphin-safe tuna 794
(4) Cooperation in fisheries and aquaculture 796
4. Other Conservation Issues 798
a. Antarctica: Environmental Protocol Annex V 798
b. U.S.-Russia Agreement on the Conservation and Management of the Alaska-Chukotka Polar Bear Population 800

B. MEDICAL AND HEALTH ISSUES 805
1. HIV/AIDS: Global Fund to Fight AIDS, Tuberculosis and Malaria 805
2. Cloning 807
C. OTHER TRANSNATIONAL SCIENTIFIC ISSUES 810
Plant Genetic Resources 810

Chapter 14
EDUCATIONAL AND CULTURAL ISSUES 813
INTERNATIONAL CULTURAL PROPERTY PROTECTION 813
Cyprus 814

Chapter 15
PRIVATE INTERNATIONAL LAW 817
A. COMMERCIAL LAW 817
1. Overview 817
2. Secured Transactions: Harmonization and Modernization 822
3. UNCITRAL Transport Convention 829
4. Inter-American Specialized Conference on Private International Law 833
5. Electronic Commerce 834
6. Enforcement of Foreign Tax Claims in U. S. Courts 837
B. FAMILY LAW 841
International Recovery of Child Support and Other Forms of Family Maintenance 841
a. Reciprocating countries for enforcement of family support obligations 841
b. Hague Conference negotiation of new child support convention 842
C. INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES 859
1. Concurrent Proceedings in Foreign Courts 859
a. International comity-based abstentions 859
b. Anti-suit injunctions 864
(1) Restrictive approach 865
(2) Liberal approach 871
2. Recognition and Enforcement of Foreign Arbitral Awards 873
3. Evidence: Discovery for Use in a Foreign Tribunal 875
4. Service of Process Abroad 877

Chapter 16
SANCTIONS 881
MODIFICATION OR LIFTING OF SANCTIONS 881
1. Terrorism-Related Measures 881
a. Taliban-controlled territory 881
(1) Modification of Executive Order 13129 882
(2) Termination of emergency 882
(3) International Traffic in Arms Regulations 884
b. Continued Sanctions: UN Security Council Resolution 1390 885
c. Guidelines for the 1267 Committee 886
d. Exceptions for basic expenses and other extraordinary expenses: UN Security Council Resolution 1452 887
e. International cooperation in disruption of terrorist financing 888
2. Iraq Oil-for-Food Program 894
a. UN Security Council Resolution 1409 894
b. Revisions in UN Security Council Resolution 1454 895
3. Unblocking of Assets of the Federal Republic of Yugoslavia (Serbia & Montenegro) 897

Chapter 17
INTERNATIONAL CONFLICT RESOLUTION AND AVOIDANCE 901
A. GENERAL 901
Role of International Law in Resolving Conflict and Controlling Violence 901
B. SPECIFIC COUNTRIES AND REGIONS 910
1. Middle East 910
a. Statement by President Bush 910
b. General Assembly resolutions on Israeli-Palestinian conflict 914
c. Joint Statement by the Quartet 916
2. Sudan 919
a. Proposals by Special Envoy 919
b. Sudan Peace Act 922
3. Eritrea/Ethiopia Boundary Commission 925
4. Haiti 926
a. Adoption of OAS Resolutions 806 and 822 926
b. Status of implementation 930

Chapter 18
USE OF FORCE AND ARMS CONTROL 933
A. USE OF FORCE 933
1. Iraq 933
a. Congressional authorization of use of force against Iraq 933
b. UN Security Council resolution on Iraq 937
(1) Adoption of Security Council Resolution 1441 937
(2) Explanation of U.S. vote 940
(3) Iraqi violations of relevant resolutions 943
(4) Declaration by Iraq 945
2. Preemptive Action in Self-Defense 947
a. National Security Strategy 947
b. Military intervention 952
3. Military Commissions 957
a. Promulgation of procedures 957
b. Commentary on military commissions: fair trials and justice 972
4. Enemy Combatants Held by the United States 976
a. Status of enemy combatant detainees 976
(1) Determination by President Bush 976
(2) Fact sheet on detainees 978
b. Habeas corpus litigation in the United States concerning enemy combatant detainees 980
(1) Access to U.S. courts in habeas proceedings by detainees at Guantanamo 980
(2) Constitutional rights of U.S. citizens being detained in the United States 986
(i) *Hamdi v. Rumsfeld* 986
(ii) *Padilla v. Bush* 998
c. Other litigation involving enemy combatant status 1001
d. Consideration by Inter-American Commission on Human Rights 1008
B. ARMS CONTROL 1017
1. Agreements with Russia 1017
a. Moscow Treaty 1017
b. Congressional testimony on Moscow Treaty 1022
c. Joint Declaration on the New Strategic Relationship 1023
d. Anti-Ballistic Missile Treaty and START II 1027
2. Open Skies Treaty 1028

3. Compliance with Arms Limitation and Disarmament and Non-proliferation Agreements 1032
4. Biological Weapons Convention 1035
a. Fifth Review Conference of States Parties 1035
b. U.S. position on Protocol to the Biological Weapons Convention 1037
C. NON-PROLIFERATION 1039
1. U.S. National Strategy to Combat Weapons of Mass Destruction 1039
2. Initiatives Aimed at Preventing the Proliferation of Weapons of Mass Destruction 1039
a. U.S.-Russia: strengthening nuclear material protection 1039
b. U.S.-Serbia 1041
c. Russian Federation Debt for Nonproliferation Act of 2002 1042
3. North Korean Nuclear Program 1044
a. Violation of Agreed Framework 1044
b. U.S. support for KEDO reaction 1047
c. U.S. views on status of KEDO agreement and relations with North Korea 1048
d. Trilateral Statement: United States, Republic of Korea and Japan 1050
e. IAEA Resolution 1052
f. Shipment of Scud missiles to Yemen 1052
4. U.S.-IAEA Additional Protocol 1057
5. International Code of Conduct against Ballistic Missile Proliferation ("ICOC") 1062
6. Nonproliferation Sanctions Imposed by the United States 1066
a. Missile proliferation 1066
b. Iran Nonproliferation Act of 2000 1067
(1) Chinese entities 1067
(2) Armenian, Chinese, and Moldovan entities 1069
c. Iran-Iraq Arms Non-Proliferation Act of 1992 and chemical/biological nonproliferation provisions of the Arms Export Control Act and the Export Administration Act of 1979 1070
7. 2005 Non-Proliferation Treaty Review Conference 1071

TABLE OF CASES 1075

INDEX 1091

Preface

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

Don Wallace, Jr.
Chairman
International Law Institute

Introduction

Calendar year 2002 gave rise to a broad range of significant and sometimes novel issues of international law. Many developments again highlighted the need to protect our national security against a different kind of enemy through the use of force in self-defense, non-proliferation and arms control efforts, the detention of unlawful enemy combatants and establishment of military commissions, continued counter-terrorism efforts, the imposition of sanctions, and the freezing of governmental assets, sometimes made available for payment of claims by individuals against terrorist states. At the same time, there were notable developments in non-confrontational contexts, including the fields of human rights, trade and investment, law of the sea, international claims and state responsibility, treaty practice, and international crime.

This volume continues the commitment of the Office of the Legal Adviser to make readily available some of the most significant documents reflecting the practice of the United States in the fields of public and private international law. We believe that there is considerable benefit to the continued development of international law in annually collecting and publishing representative briefs, statements, judicial decisions and similar documents relating to the relevant positions, practices, and procedures of the United States.

This volume is the fourth to be published since the *Digest* project was resurrected a short three years ago. While moving ahead with current-year volumes, our co-editors have also reached back to fill in the years since publication of the *Digest* was suspended following completion of the 1981–88 volumes, produced by our colleague Marion Nash Leich in 1995. The 1989–90 *Digest* volume has already been published this year, and we expect to complete and publish a multi-volume set covering the years 1991–99 sometime in 2004, along with the annual volume for calendar year 2003.

In the current volume, both the content and the organization of the *Digest* have undergone continued refinement. Additional efforts have been made to identify and include documents prepared by other departments and agencies of the U.S. Government, as well as other changes. Most importantly, we continue to welcome feedback from readers in order to make this publication even more useful in the future.

The *Digest* is a collective undertaking involving the sustained effort of many members of the Office of the Legal Adviser. Among the volunteers whose significant contributions to the current volume deserve to be acknowledged are Gilda Brancato, Harold Burman, Ashley Deeks, Carol Epstein, Monica Gaw, Katherine Gorove, Steven Hill, Duncan Hollis, Andrew Keller, Melanie Khanna, Jeff Klein, Richard Lahne, Mary Catherine Malin, Denise Manning, Michael Mattler, Mary McLeod, Steve McCreary, Eric Pelofsky, Ash Roach, Heather Schildge, John Schnitker, Walt Sulzynsky, Wynne Teel, and Kathleen Wilson. Once again, a special note of thanks goes to the Office's assistant law librarian, Joan Sherer. Contributions by interns Anna Conley and Ryika Hooshangi, and support from Tricia Smeltzer have been invaluable. The co-editors of the *Digest*, Sally Cummins and David Stewart, also deserve special recognition for the leadership, guidance, and stamina they bring to this monumental project.

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 2002, we are pleased to publish the fourth volume in the series since we resumed publication with *Digest 2000*. This past August, *Digest 1989–1990,* the first installment in our project to cover the years 1989–1999 when publication of the *Digest* was suspended, was released. Last year saw the arrival of the volume for 2001.

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, director of publishing, and Professor Don Wallace, Jr., chairman, 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 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. In *Digest 2001*, for instance, we created a special Chapter 19 in order to present material relating to the U.S. response to the terrorist attacks of September 11, 2001, in a way that would be most useful to the reader. Events and issues in future years may again occasion special chapters of one or more years' duration. Developments in 2002, however, seemed best suited to the standard organization, with issues covered in Chapter 19—terrorism, sanctions, and use of force—returned to chapters 3, 16, and 18, respectively.

As in previous volumes, we have attempted to provide internet citations to full texts of most documents excerpted in this volume. 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*.

For documents that are available from multiple public sources, both in hard copy and from various online services, such as published government documents and court opinions, we have not provided an internet address. 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*. As an example of changing web addresses, this website has recently been reorganized: Senate Treaty Documents, containing the President's transmittal of treaties to the Senate for advice and consent, with related materials, are now available at *www.gpoaccess.gov/serialset/cdocuments/index.html*. Senate Executive Reports, containing the Senate Committee on Foreign Relations reports of treaties to the Senate for vote on advice and consent, are now available at *www.gpoaccess.gov/serialset/creports/index.html*. The government's "official web portal" is *www.firstgov.gov*, with links to a wide range of government agencies and other sites. While court opinions are most readily available through commercial services, 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*.

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. Effect of Dual Nationality on U.S. Security Clearance

On March 2, 2002, the Department provided guidance in a telegram to all diplomatic and consular posts concerning the possible effect of dual citizenship of Department employees and applicants for employment on security clearance determinations. As explained in excerpts below from the telegram, dual citizenship would be considered as one factor in making a determination that access to classified information "is clearly consistent with national security."

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

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* * * *

3. Security clearance evaluations/determinations must assure that access to classified information for a specific individual is "clearly consistent with the interests of national security." Under the adjudicative guidelines, "any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." When making such a determination, DS [the Bureau of Diplomatic Security] must consider all available information, both positive and negative. This is the "whole person" concept. Dual nationality is a relevant element in some cases. While U.S. citizenship is a basic eligibility

requirement to be considered for access to classified information, it does not automatically confer the right to a security clearance. Dual citizenship must be considered in the context of other circumstances in an individual's background.

4. The Department has not implemented, and does not intend to implement, any "blanket rule" regarding dual citizenship. In making security clearance determinations, DS will continue to evaluate dual citizenship issues on a case-by-case basis . . .

5. Facts about any subject's conduct and behavior developed through required background investigation are weighed against criteria in the government-wide adjudicative guidelines. DS must be able to determine that granting access to classified information is clearly in the national security interest. A fundamental adjudicative principle is that the mere absence of derogatory information is not sufficient grounds to grant a security clearance. The government must, through an appropriate investigation and evaluation, establish a personal and professional history that positively affirms the individual's judgment, reliability, trustworthiness and loyalty to the United States. If there is any doubt about unquestioned preference for and allegiance to the United States, unencumbered by any undue foreign influence, DS must render a determination in favor of the national security and determine that individual ineligible for access. These same adjudicative principles are used in all federal personnel security programs.

6. The evaluation element presented by dual citizenship is that it could raise an issue of possible divided loyalty to the United States. Title 32 C.F.R. 174.5, Adjudicative Guideline C, Foreign Preference, provides:

(a) The concern. When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

(b) Conditions that could raise a security concern and may be disqualifying include:

(1) the exercise of dual citizenship;

(2) possession and/or use of a foreign passport;

(3) military service or a willingness to bear arms for a foreign country;

(4) accepting educational, medical or other benefits, such as retirement and social welfare, from a foreign country;

(5) residence in a foreign country to meet citizenship requirements;

(6) using foreign citizenship to protect financial or business interests in another country;

(7) seeking or holding political office in the foreign country;

(8) voting in foreign elections;

(9) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(c) Conditions that could mitigate security concerns include:

(1) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(2) indicators of possible foreign preference (*e.g.*, foreign military service) occurred before obtaining United States citizenship;

(3) activity is sanctioned by the United States;

(4) individual has expressed a willingness to renounce dual citizenship.

7. . . . While not all inclusive, the following examples give an indication of how such factors are evaluated and determinations made:

> Example A. A subject derived foreign citizenship from his or her parents. In this case, DS would examine whether or not the subject has exercised the foreign citizenship: by accepting educational, medical or social welfare benefits for himself/herself or family; possessing and using the foreign passport; serving in the foreign military; working for the foreign government; etc. In the absence of the subject's exercising foreign citizenship, and if subject's current and past actions consistently demonstrated preference for and allegiance to the United States, then dual citizenship would not preclude a security clearance.
>
> Example B. A subject only recently became a naturalized U.S. citizen through marriage and has no previous ties to the United States. In this case, DS could not likely grant

an immediate security clearance, since the demonstrated loyalty requirement could not be satisfied immediately. Eligibility for access could be reconsidered after a passage of time during which the subject would have the opportunity to clearly demonstrate preference for and unquestioned allegiance to the United States, and the absence of any undue conflicting influence, as required by the referenced guidelines.

Example C. A subject was born in the U.S. as the child of foreign visitors. The subject left the U.S. in infancy, never returned and has no ties or history which indicate a preference for and allegiance to the United States. DS would not have the background information required to grant a security clearance.

Example D. A subject is a naturalized U.S. citizen and dual national who is willing to relinquish his foreign passport but is not/not willing to renounce foreign citizenship of birth. The subject explains that the reason for this position Is: (1) so that children can continue to enjoy free foreign education benefits; (2) for possible future employment opportunities; and (3) for foreign inheritance purposes. DS would not be able to clearly determine the individual's preference for the United States, sufficient to grant a security clearance.

* * * *

10. Dual citizenship also presents an issue in the assignment of staff to overseas posts. For example, the Vienna Convention on Diplomatic Relations does not provide diplomatic privileges and immunities for dual nationals; most countries do not unilaterally grant such privileges and immunities. Absent extraordinary circumstances, the Department will not assign an employee to a country where he or she is a citizen.

* * * *

2. Revocation of U.S. Citizenship

During 2002 U.S. federal courts revoked U.S. citizenship of two persons found to have participated in Nazi atrocities during World War II. In *U.S. v. Demjanjuk*, 2002 U.S. Dist. LEXIS 6999, the U.S. District Court for the Northern District of Ohio Eastern Division, revoked the citizenship of John Demjanjuk, ruling that he had served the Nazi regime during World War II as a "willing" guard at Nazi camps "for more than two years." In *U.S. v. Gorshkow* No. 02–186, Slip op. (N.D. Fla. Aug. 7, 2002), the U.S. District Court for the Northern District of Florida based the revocation of citizenship on Gorshkow's participation in the mass murder of Jews and other civilians in 1942 and 1943 during the Nazi occupation of Belarus while serving in the Gestapo, the Nazis' secret state police.

These revocations were the result of investigations and prosecution by the Office of Special Investigations in the Criminal Division of the U.S. Department of Justice ("OSI"). A press release issued by the Department of Justice concerning *Gorshkow* explains the work of the office:

> The proceedings to denaturalize Gorshkow are a result of OSI's ongoing efforts to identify and take legal action against former participants in Nazi persecution residing in this country. Gorshkow is the 70th Nazi persecutor stripped of U.S. citizenship since OSI began operations in 1979. Additionally, 56 such individuals have been removed from the United States, and 165 suspected Nazi persecutors have been stopped at U.S. ports of entry and barred from entering the country. More than 160 U.S. residents are currently under active investigation by OSI.

available at *www.usdoj.gov/opa/pr/2002/July/02_crm_446.htm*.

Revocation of citizenship in these cases results from findings of unlawful immigration to the United States. In each case, Demjanjuk and Gorshkow were found to have lied on visa applications to conceal their involvement in

Nazi persecutions. Excerpts below from the district court's conclusions of law in *Demjanjuk* explain the legal analysis in that case.*

* * * *

31. Where there has not been "strict compliance" with all congressionally imposed prerequisites to the acquisition of citizenship, naturalization is illegally procured. *See Fedorenko*, 449 U.S. at 505–06; *Dailide*, 227 F.3d at 389.

32. Where naturalization is "illegally procured," a grant of citizenship must be revoked. 8 U.S.C. § 1451(a); *Fedorenko*, 449 U.S. at 506; *Dailide*, 227 F.3d at 389.

33. As a prerequisite to obtaining naturalization, an individual must have entered the United States under a valid visa. *See, e.g., Fedorenko*, 449 U.S. at 514–15; *see also* 8 U.S.C. § 1427(a)(1).

35. An individual seeking to enter the United States under the Displaced Persons Act of 1948, Pub. L. No. 80–774, ch. 647, 62 Stat. 1009, *as amended*, June 16, 1950, Pub. L. No. 81–555,

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* The Press Release by the Department of Justice provides the following brief description of the long history of the proceedings against Demjanjuk:

> Demjanjuk was first tried on allegations of Nazi persecution in 1981. A federal court found that Demjanjuk was "Ivan the Terrible," a gas chamber operator at the Treblinka extermination camp. He was extradited to Israel in 1986, convicted of crimes against humanity by an Israeli trial court, and sentenced to death. However, after the Israeli Supreme Court found that reasonable doubt existed as to whether Demjanjuk was Ivan the Terrible, he was released and returned to the United States. In 1998, Chief Judge Matia vacated the original denaturalization order, finding that the government recklessly failed to produce potentially exculpatory evidence to Demjanjuk in the original proceedings, but he authorized the government to reinstitute denaturalization proceedings if it had evidence supporting other charges against Demjanjuk. The government filed new charges in 1999, relying in large part on evidence that had come to light following Demjanjuk's conviction in Israel, when the collapse of the Soviet Union led to the release of Nazi records that had been captured by the Soviet army. (*www.usdoj.gov/opa/pr/2002/February/02_crm_094.htm.*)

See also discussion in *Cumulative Digest 1981–1988* at 532–534 and 729–737.

64 Stat. 219 ("DPA"), first had to be deemed "of concern" to the International Refugee Organization ("IRO"). . . .

36. Annex I, Part II of the IRO Constitution identified certain categories of persons who were not "the concern" of the IRO, including, "Any . . . persons who can be shown: (a) to have assisted the enemy in persecuting civil populations of countries . . ." (62 Stat. 3051, 3052). . . .

37. Under the DPA, visas could not be granted to anyone who assisted in the persecution of any person because of race, religion, or national origin. 64 Stat. 219, 227. . . .

* * * *

43. An individual's service in a unit dedicated to exploiting and exterminating civilians on the basis of race or religion constitutes assistance in persecution within the meaning of the DPA. . . .

* * * *

45. The Government has proven by clear, convincing, and unequivocal evidence that Defendant assisted in the persecution of civilian populations during World War II.

46. Because of his assistance in persecution, Defendant was ineligible for a visa pursuant to DPA § 13, 64 Stat. 219. His entry to the United States for permanent residence in 1952 on the basis of a visa issued under the DPA was therefore unlawful and his naturalization as a United States citizen was illegally procured.

* * * *

56. [In addition, b]ecause of his membership and participation in a movement hostile to the United States, Defendant was ineligible to immigrate to the United States pursuant to DPA § 13. His entry to the United States for permanent residence in 1952 was therefore unlawful and his naturalization as a United States citizen was illegally procured. . . .

57. Section 10 of the DPA barred from immigration any person who willfully misrepresented material facts to gain admission to the United States as a displaced person. 62 Stat. at 1013. . . .

* * * *

60. A willful and material misrepresentation to a United States Vice Consul, made to gain admission to the United States, is actionable *per se* under Section 10 of the DPA. . . .

61. When applying for IRO assistance, Defendant misrepresented and concealed his wartime residences and activities, which constituted misrepresentations and concealments of his wartime employment and residences for the purpose of gaining admission into the United States.

* * * *

68. Because of his knowing misrepresentation of material facts to the IRO, which were relied on by the DPC, and because of his knowing misrepresentation of material facts to the DPC and Vice Consul, Defendant was ineligible to immigrate to the United States pursuant to DPA § 10. His entry to the United States for permanent residence in 1952 was therefore unlawful and his naturalization as a United States citizen was illegally procured and must be revoked.

* * * *

3. Child Citizenship Act

The Child Citizenship Act of 2000, Pub. L. No. 106–395, 114 Stat. 1631, amended and repealed Sections 320–322 of the Immigration and Nationality Act, 8 U.S.C. § 1431, to facilitate acquisition of U.S. citizenship by children of U.S. citizens born abroad in certain circumstances. *See* discussion in *Digest 2001* at 3–6. On April 15, 2002, the U.S. Court of Appeals for the Eleventh Circuit held that the Act did not operate retroactively to provide citizenship for persons who were older than 18 on the effective date of the statute, February 27, 2001. *U.S. v. Arbelo*, 288 F.3d 1262 (11th Cir. 2002). The court noted that "[t]he Act specified that its amendments to prior law "shall take effect 120 days after the date of the enactment of this Act and shall apply to individuals who satisfy the requirements as in effect on such effective date." *Id.* at 1263. *Accord, Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001); *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001).

4. Citizenship Claim under former Section 320 INA

In response to a request from the American consulate general in Hong Kong, the Department of State provided guidance concerning acquisition of citizenship under § 320 of the Immigration and Nationality Act ("INA") before it was amended by the Child Citizenship Act, discussed *supra*. In that case, a woman born in Hong Kong in 1973, and admitted to the United States for the purpose of adoption in 1983, had been adopted in 1985 by a U.S. mother and a father who had become a naturalized U.S. citizen two months before the adoption. In a telegram of May 10, 2002, the Department concluded that the person in question had automatically acquired citizenship at the time of her adoption, as explained in excerpts from the telegram set forth below.

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* * * *

[1] . . . Former Section 320 INA allows for automatic acquisition of U.S. citizenship for a child born overseas [with one] American citizen parent through the naturalization of the alien parent, provided that the child is residing in the U.S. at the time of naturalization of the alien adoptive parent, is in the custody of the adoptive parents pursuant to a lawful admission for permanent residence, while under the age of 18 and unmarried. Provided all other requirements of former Section 320 INA have been met, post has asked whether the adoption must have been finalized at the time the adoptive alien parent was naturalized.

2. It is the opinion of the Department that all the requirements of Section 320 INA need not be met sequentially, provided all the requirements are met prior to age 18. Therefore, Department considers that [the person in question] acquired U.S. citizenship on September 11, 1985, upon the completion of the final requirement set forth in former Section 320 INA, that is, upon the finalization of her adoption.

5. *In Vitro* Conception

In January 2002 the Department responded to a request for guidance from the American embassy in Seoul, Republic of Korea, concerning the citizenship of twins conceived *in vitro*. The twins were born in Seoul to a naturalized American citizen mother and a father who was a citizen of the People's Republic of China ("PRC"). The PRC national father was the sperm donor. The egg donor was not the American citizen mother, however, and no assumption could be made that the egg donor was an American citizen. On these facts, the Department concurred with the embassy's conclusion that the applicant had not demonstrated the existence of a blood relationship between her and the children, as required by law, and that the children had therefore not acquired U.S. citizenship. Excerpts below from a telegram of January 8 provide the analysis of the statutory provision applicable to the case.

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

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1. . . . In order to establish a claim to U.S. citizenship under Section 301(g) [of the Immigration and Nationality Act ("INA")], the INA requires, among other things, that a blood relationship exist between the child and the U.S. citizen parent.

2. Based on the information presented . . . and the fact that the [American citizen] surrogate mother was not the egg donor, the applicant has not/not demonstrated the existence of a blood relationship between her and the children. As a result, the children have not acquired U.S. citizenship. Additionally, no/no assumption can be made that the egg donor was a U.S. citizen. If the egg donor is identifiable and is a U.S. citizen, that individual must meet the requirements to transmit citizenship, and must cooperate in the documentation of the citizenship claim. When a surrogate mother who is not the egg donor gives birth to a child, the case should be adjudicated as if the child had been born out of wedlock.

3. Please explain that we are in no way questioning the legal relationship between the child and the U.S. citizen mother. . . .

4. Department notes that in the alternative, the child could receive an [immigrant visa ("IV")]. . . .

* * * *

B. PASSPORTS

1. Two-Parent Consent Requirement for Passport Issuance

In an effort to deter parental child abduction, the Department of State does not issue passports to children under age 14 unless both parents signed the passport application, except in certain limited circumstances. *See* 22 U.S.C. § 213n. The statute provides, for instance, that one parent may execute the application if he or she provides "documentary evidence that such person (i) has sole custody of the child. . . ." As authorized by the statute, implementing regulations provide for waiver in cases of exigent circumstances. 66 Fed. Reg. 29,904 (June 4, 2001). *See also* Digest 2001 at 8–9.

a. Special court order

In 2002 the Department provided advice to a U.S. post abroad on the significance of a special court order permitting the mother to travel and establish her domicile abroad with the child. As set forth in excerpts below from the telegram of May 15, 2002, the court order in this case provided the basis for issuing a passport on the mother's signature alone.

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

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* * * *

2. . . . The two-parent consent statute requires that "the person executing the application must provide documentary evidence that such person-(i) has sole custody of the child." The parents in the

case at hand share joint custody; the mother has primary physical custody, the father visitation. Primary physical custody in a joint custody situation is not the same as the statutory requirement of sole custody. However, a court order permits the applying parent to domicile the child in a foreign country.

3. Because the court order permits the mother to travel and establish domicile with the child in a foreign country, it comes within the purview of 22 CFR 51.27(iii)(f), which implements the two-parent consent requirement and provides that documentary evidence in support of a passport application may include "an order of a court of competent jurisdiction specifically permitting the applying parent's or guardian's travel with the child." A court order such as the one presented to post authorizing domicile obviously authorizes the applying parent's travel with the child. A narrow interpretation of 22 CFR 51.27 or the statute's sole custody provision would cause great hardship to [American citizen] families overseas. . . .

b. Exception where mother reclaiming children abducted by father

In a telegram of November 13, 2002, the Department of State authorized a U.S. post abroad to issue a passport for children without the signature of the father where the mother was traveling to that country to reclaim the children who had previously been abducted by the father and left in the foreign country. Excerpts from the telegram set forth below provide the Department's view on the legal issue presented. The telegram also requested that the post provide assistance to the mother and to verify the location and condition of the children in advance of the mother's arrival.

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

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* * * *

3. Department has reviewed the circumstances of the [XXX] case and authorizes post to issue passports for [XXX's three children] . . . on the basis of Mrs. XXX's single signature and without

the approval of the taking parent. . . . Mrs. XXX is currently in possession of a Writ of Attachment issued by the Dallas County District Court in Texas, ordering the return of the children to their mother's custody. In addition, the children's father is in the United States and subject to a bond prohibiting his departure pending a hearing on kidnapping charges. The court order, Mr. XXX's present bond status, and the children's current welfare . . . meet the criteria for the exigent circumstances exception to the two-parent signature requirement. Post should issue passports for the three children, provided they are otherwise qualified.

* * * *

2. Denial of Passport for Non-Payment of Child Support

The Secretary of State is required to deny (or, as appropriate, revoke, restrict or limit) passports of persons owing child support arrearages in excess of $5,000. The denial is triggered when the case is certified by the Secretary of Health and Human Services, on the basis of an underlying certification of a state agency. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, § 370, 110 Stat. 2105 at 2251, 42 U.S.C. § 652(k). The Department of State promulgated implementing regulations at 22 C.F.R. § 51.70(a)(8) (2001).

On August 23, 2002, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court ruling rejecting a constitutional challenge to the denial of a passport under these authorities. *Eunique v. Powell*, 302 F.3d 971 (9th Cir. 2002). In that case, the father had been awarded custody of the children and the mother was ordered to pay child support. At the time the case came before the court of appeals she admitted to owing between $28,000 and $30,000. The court of appeals decision is excerpted below (footnotes deleted.). *See also Digest 2001* at 9–13.

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* * * *

Eunique argues that there is an insufficient connection between her breach of the duty to pay for the support of her children, and the government's interference with her right to international travel. Thus, she argues, her constitutional rights have been violated. We disagree.

Eunique asserts that she has a constitutional right to international travel, which is so fundamental that it can be restricted for only the most important reasons, and by a narrowly tailored statute. It is undoubtedly true that there is a constitutional right to international travel. *See Kent v. Dulles*, 357 U.S. 116, 125, 78 S. Ct. 1113, 1118, 2 L. Ed. 2d 1204 (1958). However, as the Supreme Court has said, "the right of international travel has been considered to be no more than an aspect of the liberty protected by the Due Process Clause of the Fifth Amendment. As such this right, the Court has held, can be regulated within the bounds of due process." *Haig v. Agee*, 453 U.S. 280, 307, 101 S. Ct. 2766, 2782, 69 L. Ed. 2d 640 (1981) (citations and internal quotation marks omitted); *see also Zemel v. Rusk*, 381 U.S. 1, 14–15, 85 S. Ct. 1271, 1279–80, 14 L. Ed. 2d 179 (1965); *Aptheker v. Sec'y of State*, 378 U.S. 500, 505, 84 S. Ct. 1659, 1663, 12 L. Ed. 2d 992 (1964). In that respect, it differs from "the constitutional right of interstate travel [which] is virtually unqualified." *Haig*, 453 U.S. at 307, 101 S. Ct. at 2782 (internal quotation marks and citations omitted). The difference means that we do not apply strict scrutiny to restrictions on international travel rights that do not implicate First Amendment concerns.

At an early point in the development of Supreme Court jurisprudence in this area, the Court seemed to suggest that restrictions upon travel must be looked upon with a jaded eye. *See Aptheker*, 378 U.S. at 507–514, 84 S. Ct. at 1664–68. However, it was then dealing with a law which touched on First Amendment concerns because it keyed on mere association. *Id.* at 507–08, 84 S. Ct. at 1664–65. The Court has not been as troubled in cases which do not directly involve those concerns. *See Haig*, 453 U.S. at 306–08, 101 S. Ct. at 2781–82; *Zemel*, 381 U.S. at 14–15, 85 S. Ct. at 1279–80. Rather, as I see it, the Court has suggested that rational basis review should be applied.

* * * *

. . . [W]e must presume § 652(k) to be valid, and we must uphold it "if it is rationally related to a legitimate government interest." *Rodriguez v. Cook*, 169 F.3d 1176, 1181 (9th Cir. 1999).

The statute easily passes that test. There can be no doubt that the failure of parents to support their children is recognized by our society as a serious offense against morals and welfare. It "is in violation of important social duties [and is] subversive of good order." *Braunfeld v. Brown*, 366 U.S. 599, 603, 81 S. Ct. 1144, 1146, 6 L. Ed. 2d 563, 17 Ohio Op. 2d 241 (1961). It is the very kind of problem that the legislature can address.

Moreover, the economic problems caused by parents who fail to provide support for their children are both well known and widespread. They can be exacerbated when the non-paying parent is out of the state, as, of course, a parent traveling internationally must be. . . .

* * * *

All of this not only illustrates the rationality of Congress's goal, but also demonstrates its rational connection to the passport denial in question. Surely it makes sense to assure that those who do not pay their child support obligations remain within the country, where they can be reached by our processes in an at least relatively easy way. Notably, even when the Court iterated the constitutional right to travel in *Kent*, 357 U.S. at 127, 78 S. Ct. at 1119, it, without disapproval, took notice of a long-standing policy of denying passports to those who were "trying to escape the toils of the law" or "engaging in conduct which would violate the laws of the United States." A person who fails to pay child support may well attempt to escape the toils of the law by going abroad, and may even be violating the laws of the United States. *See*, *e.g.*, 18 U.S.C. § 228; *see also* Cal. Penal Code § 270.

* * * *

We hold that, without violating Eunique's Fifth Amendment freedom to travel internationally, Congress (and the State Department) can refuse to let her have a passport as long as she remains in substantial arrears on her child support obligations. . . .

* * * *

3. New Passport for Escaped U.S. Prisoner

On May 3, 2002, the Department of State provided guidance to a U.S. post abroad on issuing a new passport to an American citizen who had escaped from custody in another country. In that case, the American citizen had been arrested in Accra, Ghana for drug possession. She had escaped, traveled to Nigeria and applied for a new passport at the U.S. Consulate General in Lagos. Although she indicated on her passport application that her passport was misplaced in Nigeria, it was in fact being held by Ghanaian authorities. Agents of the Department of State's Office of Diplomatic Security were seeking an arrest warrant in the United States for violation of 18 U.S.C. § 1542 (false statement in application for a passport) but no warrant had been issued at the time of the passport application. Excerpts below from the telegram relaying the Department's advice provide its reasons for concluding that in these circumstances there was no legal ground for denying a new passport. As noted in a similar case in December 2002, "there is no provision [under U.S. law] for denial of passport services on the basis of foreign criminal charges." The Department nevertheless authorized issuance only of a limited validity passport.

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3. Grounds for Denial of Passport: 22 C.F.R. 51.70 provides limited circumstances in which a passport can be denied. Such circumstances include 1) when the applicant is the subject of an outstanding Federal warrant of arrest for a felony; 2) when the applicant is subject to a criminal court order, condition of probation, or condition of parole, any of which forbids the departure from the United States; 3) when the applicant is the subject of a request for extradition or provisional arrest for extradition which has been presented to the government of a foreign country by the United States; or 4) when the Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United

States. Section 51.71 provides for denial of passport to certain convicted drug traffickers. This section generally applies only in cases in which the applicant is subject to imprisonment or supervised release as a result of a felony conviction for a Federal or state drug offense if the individual used a U.S. passport or otherwise crossed an international border in committing the offense.

4. [The American citizen in this case ("Amcit")] is not the subject of an outstanding federal warrant, a criminal court order, or a request for extradition by the U.S. The provisions of 51.71 do not apply. While the Department strongly opposes the illegal activities alleged in this instance, it does not consider subject's activities likely to cause serious damage to the national security of the U.S.

5. Lacking legal grounds for denial of passport services, and assuming subject wishes to travel immediately, ConGen Lagos should issue a one-year, limited validity passport to subject, using endorsement code 103. Prior to issuance, post should inform subject that it is aware of the current disposition of her passport and, per 7 [Foreign Affairs Manual ("FAM")] 462(f), ask that she provide a new statement accurately portraying the disposition of said passport and the details of her departure from Ghana and entry into Nigeria. However, post should issue Amcit a passport even if she declines to provide a new statement.

6. Per 7 FAM 1371.3(d) and 7 FAM 462(e), following issuance of the passport, ConGen Lagos should contact Embassy Accra and ask that it request the return of subject's previous passport from Ghanaian authorities.

* * * *

4. Denial or Limitation of Passports

On June 11, 2002, the Department of State provided general guidance in a telegram to all U.S. diplomatic and consular posts abroad on denial or limitation of passports in law enforcement and mental illness cases, excerpted below.

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

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2. Law enforcement—Passport regulations (22 C.F.R. 51.70) provide for the denial or revocation of a passport in any case where the Secretary determines or is informed by competent authority that the applicant is the subject of an outstanding federal warrant of arrest for a felony. The regulations also provide for denial of a passport if the applicant is the subject of a criminal court order, condition of probation or condition of parole. . . .

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4. Posts do not have authority to deny or limit a passport, unless for citizenship or identity reasons, solely on the basis of suspicions or allegations of illegal foreign or domestic activities. . . .

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7. Mental conditions—In instances where post is contacted regarding passport denial to an individual who may be suffering from a mental illness, the caller also should be referred to the Department. Denial of passport services for mental illness is specifically provided for in 22 C.F.R. 51.70(a)(3), [which] limits denial of passport services to individuals who are the subject of a court order committing him or her to a mental institution. . . .

8. Mental illness cases as described above should not be confused with the medical assistance cases on which posts routinely work (7 FAM 360). In the cases described para 7 above, a court has determined that the individual is not competent to handle his/her own affairs and has appointed a guardian. The guardian has requested the passport restriction based on the court order.

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C. IMMIGRATION AND VISAS

1. Applicability of 1949 Convention on Road Traffic

On April 12, 2002, Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Department of State, responded to an inquiry concerning the 1949 Convention on Road Traffic ("CRT"), 3 U.S.T. 3008, T.I.A.S. No. 2487. The

inquiry, from the Prosecuting Attorney's Council of Georgia, concerned applicability of the CRT to a foreign national in the United States without authority. The letter from the Department is set forth in full below.

I have been asked to respond to your January 10, 2002, letter to the Legal Adviser concerning the interpretation of the 1949 Convention on Road Traffic ("CRT"), TIAS 2487, published in 3 UST 3008. Specifically, you noted that Article 24(1) of the CRT requires the United States in certain circumstances to permit "any driver admitted to its territory" to drive using a driver's license issued by another country. You asked whether Article 24(1) "applies to either a foreign national who has either entered the United States without authority or one who remains in the United States without authority."

We do not believe that the CRT requires that federal or state authorities recognize the foreign driver's license of a driver who has entered the United States without authority. We understand "admitted to its territory" to mean an alien driver that the receiving state—in this case, the United States—has affirmatively authorized to be in its territory. The word "admitted" implies such an affirmative action granting authorization and in our view is not intended to encompass a person merely found or present in the territory of the receiving state without having been allowed to enter through an affirmative act of "admission" by the receiving state.

This view is consistent with Section 101(a)(13) of the Immigration and Nationality Act ("INA"), which now provides that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." While the CRT is a multilateral international agreement that can be interpreted independently of the INA, in this case we believe that the INA reflects a generally accepted understanding of the concept of "admission" and one that the United States can reasonably apply in administering the CRT in its territory.

We do not recall previously addressing your second question, relating to persons who have been admitted to the United States

but who have violated the conditions of admission, particularly by exceeding their authorized period of stay. We note, however, that Article 1 of the CRT provides that, "No Contracting State shall be required to extend the benefit of the provisions of this Convention to . . . any driver having remained within its territory for a continuous period exceeding one year." Consistent with this, the International Driving Permit ("IDP") provided for in Annex 10 of the CRT is valid for only one year. We also note that the IDP expressly states that "this permit shall in no way affect the obligation of the holder to conform strictly to the laws and regulations relating to residence which are in force in each country through which he travels."

Reading these provisions as a whole, we believe that the State of Georgia, consistent with the CRT, (1) must permit an alien to drive in Georgia using a foreign driver's license issued by a country party to the CRT only if the alien has been lawfully admitted to the United States; (2) must permit a lawfully admitted alien to drive in Georgia using a foreign driver's license of a CRT party only during the first year after the alien's admission; and (3) may, in accordance with Georgia's residency laws, require an alien resident in Georgia to obtain a Georgia driver's license as a condition for continued authorization to drive. By the same token, nothing in the CRT would prevent the State of Georgia from applying more liberal rules with respect to the driving privileges of aliens.

2. Compliance with U.S.-Cuba Migration Accords: Report to Congress

In 1994 and 1995 the United States and Cuba reached agreement on certain issues relating to migration from Cuba, referred to as the Migration Accords. The September 9, 1994, Joint Communiqué commits the United States to permit the legal migration to the United States of 20,000 Cuban nationals each year (not including immediate relatives of United States citizens). The May 2, 1995, Joint Statement provides for the return to Cuba of Cuban nationals who are interdicted at sea by the U.S. Coast Guard while attempting

to enter the United States, or who enter the U.S. Naval Base at Guantanamo Bay, and who do not have protection concerns. Under this Joint Statement, Cuba and the United States pledged to "ensure that no action is taken against those migrants returned to Cuba as a consequence of their attempt to immigrate illegally."

Pursuant to § 2245 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105–277, 112 Stat. 2681 at 2681–824, the Department of State submits a semi-annual report to Congress concerning the methods employed by the Government of Cuba to enforce the 1994 Joint Communiqué and its treatment of persons returned to Cuba pursuant to the 1995 Joint Statement. The introduction to the October 2002 report notes that the Migration Accords "aim to promote 'safe, legal, and orderly' migration as an alternative to illegal immigration," and states:

> U.S. Government efforts under the Migration Accords have curbed the Government of Cuba's pre-1995 practice of retaliating against individuals who have exited Cuba illegally. However, returned migrants, as well as other individuals who express an interest in immigrating to the United States, continue to report difficulties in pursuing their desire to leave.

The excerpts below provide the October report's conclusions.

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

Conclusion

The United States remains committed to fully implementing the Migration Accords, as an effective tool to encourage safe, legal, and orderly migration.

Despite the overheated commentary of President Castro, the Cuban government takes appropriate actions to stem illegal migration from Cuba and is complying with the Migration Accords.

There are still areas of concern, which the U.S. Government has raised, with the GOC [Government of Cuba]. Implementation could be improved and the Migration Accords could be more effective if the GOC were willing to take the following actions:

- Discontinue the denial of Cuban exit permits to individuals with valid U.S. travel documents, whether obtained through the in-country refugee program, immigrant visa issuance, the Diversity Visa Lottery, or the Special Cuban Migration Program (a.k.a. "The Lottery").
- Ensure that the policy of not taking action against individuals who express an interest in emigrating to the United States, or those returned to Cuba by the U.S. Coast Guard after an irregular departure, is fully implemented by all levels of the Cuban government.
- Permit continued technical discussions between U.S. consular and INS officials, and their Cuban counterparts, on document fraud prevention issues.
- Insist that local authorities allow all persons who have departed irregularly to resume their former employment, if they have not committed a criminal offense in addition to leaving Cuba illegally. If another person has been hired in their absence, returning migrants should be allowed to seek and obtain comparable employment.
- Ensure that medical screening of prospective migrants complies with guidelines established by the U.S. Public Health Services requirements.

3. Suspension of Entry: Zimbabwe

On February 22, 2002, President George W. Bush issued a proclamation suspending entry into the United States of persons responsible for actions that threaten Zimbabwe's democratic institutions and transition to a multi-party democracy. 67 Fed. Reg. 8,857 (Feb. 26, 2002). Excerpts below from the proclamation explain the basis for the suspension of entry.

In light of the political and humanitarian crisis in Zimbabwe and the continued failure of President Robert Mugabe, Zimbabwean government officials, and others to support the rule of law, and given the importance to the United States of fostering democratic institutions in Zimbabwe, I have determined that it is in the interest of the United States to take all available measures to restrict the international travel and to suspend the entry into the United States, as immigrants or nonimmigrants, of senior members of the government of Robert Mugabe and others detailed below who formulate, implement, or benefit from policies that undermine or injure Zimbabwe's democratic institutions or impede the transition to a multi-party democracy.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by the authority vested in me by the Constitution and laws of the United States, including Section 212(f) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(f), and Section 301 of title 3, United States Code, hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of persons described in Section 1 of this proclamation would, except as provided for in Sections 2 and 3 of this proclamation, be detrimental to the interests of the United States.

I therefore hereby proclaim that:

Section 1. The entry into the United States, as immigrants or nonimmigrants, of the following persons is hereby suspended:

(a) Senior members of the government of Robert Mugabe and other Zimbabwe nationals who formulate, implement, or benefit from policies that undermine or injure Zimbabwe's democratic institutions or impede the transition to a multi-party democracy;

(b) Persons who through their business dealings with Zimbabwe government officials derive significant financial benefit from policies that undermine or injure Zimbabwe's democratic institutions or impede the transition to a multi-party democracy; and

(c) The spouses of persons described in paragraphs (a) and (b), above.

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

Sec. 3. Persons covered by Sections 1 and 2 of this proclamation shall be identified by the Secretary of State or the Secretary's designee, in his or her sole discretion, pursuant to such procedures as the Secretary may establish under Section 5 of this proclamation.

D. ASYLUM AND REFUGEE STATUS AND RELATED ISSUES

1. Vietnamese Montagnard Refugees in Cambodia

On January 21, 2002, the UN High Commissioner for Refugees ("UNHCR") and the governments of Vietnam and Cambodia entered into a trilateral agreement covering repatriation to Vietnam, reintegration assistance, and monitoring of some 1,100 Montagnard asylum seekers. Montagnards, meaning mountain people, is the collective name applied to several ethnic minority tribes living in the central highlands of Vietnam, many of whom fought alongside Americans there during the Vietnam War. The Montagnards began fleeing to Cambodia in February 2001, after general unrest in the wake of demonstrations regarding land disputes and religious strife in the Central Highlands in May and June 2001. The UNHCR established two camps to which the asylum seekers were admitted. On March 21, 2002, the State Department issued a press statement reflecting its concern with confirmed reports "that the Vietnamese government sent 12 tour buses with over 400 individuals to the UN High Commission for Refugees camp in Cambodia's Mondolkiri province on March 21 to persuade Montagnard refugees to return to Vietnam. Cambodian officials admitted the visitors to the camp over the objections of the UNHCR." The press statement indicated that the United States "continues to support repatriation as one choice for this population, so long as it adheres to the core principle that all repatriations must be voluntary, based on credible, meaningful pre- and post-repatriation inspections, and counseling by UNHCR."

On March 26, 2002, the Department of State issued a further press release, excerpted below, formally offering to take

in all qualifying Montagnard refugees in Cambodia who wished to be resettled, and requesting that the Cambodian government facilitate the move. At the end of March, the Cambodian government agreed to the U.S. resettlement proposal. Some 200 Montagnards voluntarily returned to Vietnam. Approximately 900 were moved by the UNHCR to Phnom Penh for processing for resettlement in the United States. At the end of 2002 most had been resettled in the United States.

The full texts of the March 21 and March 26 press releases are available at *www.state.gov/r/pa/prs/ps/2002/8871.htm* and *www.state.gov/r/pa/prs/ps/2002/9009.htm*.

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The UN High Commissioner for Refugees has concluded on the basis of March 21 and other incidents that, unfortunately, conditions that would allow for a satisfactory voluntary repatriation of the Montagnard population do not exist at this time.

In light of the urgent humanitarian needs of these asylum-seekers, the United States has formally offered resettlement in the United States to all among this group who qualify and wish to be resettled. We request that the Royal Government of Cambodia respond to this offer as quickly as possible.

We continue to support voluntary repatriation to Vietnam as one of several durable solutions for this population. In this case the solution should adhere to the core principle that all repatriations must be voluntary, based on credible, meaningful, pre- and post-repatriation inspections and counseling by the UN refugee agency. We urge Cambodian and Vietnamese authorities to work with the UN to establish a framework which would permit voluntary repatriation under these conditions. However, voluntary repatriation on these terms is not now available and we urge the Cambodian government to facilitate resettlement for those who seek it.

2. Haitian Refugees

In letters of October 3 and November 7, 2002, Congresswoman Ileana Ros-Lehtinen requested information from the

Department of State regarding U.S. policy toward Haitian refugees. Excerpts from the responses of the Department are set forth below.

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

Q: 1) Under U.S. law, aliens must show a well-founded fear that, if returned home, they will be persecuted based on one of five characteristics. Two of these categories are: political opinion or membership in a particular social group. Could you elaborate on what group of Haitians would not find themselves in fear of persecution on the basis of these two categories? How does the Department evaluate "persecution" on these grounds? Please elaborate on what, in the Department's assessment, would constitute "credible fear"? What evidence is required to substantiate or meet the "credible fear" requirement?

A: The Immigration and Naturalization Service (INS [or "Service"]) is responsible for making determinations on which asylum seekers meet the U.S. definition of refugee. Such determinations are made on an individual, case-by-case basis; it would thus be inappropriate to say which groups of Haitians would or would not qualify for asylum in the United States.

A fundamental question in any protection assessment is whether the harm that an applicant has suffered amounts to persecution, a term that has developed meaning through the common law process, but that is not currently defined in international treaties, domestic statutes, or regulations. In December 2000, the Service and the Department of Justice published a proposed regulation that offered a regulatory framework for defining "persecution." The supplement to that proposed rule describes in great detail how the Service and Justice Department envisioned that the term "persecution" should be evaluated. *See* 65 Fed. Reg. 76588 (Dec. 7, 2000). While that proposed rule has not become effective by publication of an interim final rule, the section relating to the definition of persecution is largely a summary of current case law, rather than a modification of or departure from current law.

The term "credible fear" means that "there is a significant possibility, taking into account the credibility of the statements made

by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208." See 8 USC 1225(b)(1)(B)(v); 8 CFR 208.30. Furthermore, the Immigration Officer Academy's Asylum Officer Basic Training Course (June 21, 2002) offers the following general considerations on how an asylum officer should apply the credible fear standard:

1. The standard of proof required to establish a credible fear of persecution is lower than the standard of proof required to establish past persecution or well-founded fear of future persecution.
2. The officer should draw all reasonable inferences in favor of the applicant. The officer is to accord the "benefit of the doubt" to the applicant.
3. When there is reasonable doubt regarding an issue, that issue should be decided in favor of the applicant. When there is reasonable doubt regarding the decision, the applicant should be determined to have a credible fear of persecution.
4. Disputed, close, or novel questions of law should be resolved in the manner most favorable to the applicant.
5. Where there is disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue, or where the claim otherwise raises an unresolved issue of law, the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.
6. Questions as to how the standard is applied should be resolved by considering that it is a low-threshold test designed to screen all persons who could qualify for asylum into the hearing process.

Q: 2) The Foreign Relations Authorization Bill Conference Report which the President signed into law September 30, makes permanent the prohibition on the involuntary return of refugees and goes on to refer to a process genuinely calculated to identify and protect refugees. Do you believe that the interviews conducted by asylum officers on board Coast Guard cutters meet the criteria of

a "process genuinely calculated to identify and protect refugees?" Do you believe that asylum officers on board these Coast Guard cutters have the necessary background and expertise regarding the situation in Haiti to be able to make an informed decision on the status of Haitian refugees?

A: Yes. We believe that any interviews conducted by asylum officers on board Coast Guard cutters are "genuinely calculated to identify and protect refugees." We note that on-board screenings generally use the "credible fear" standard, which is significantly more generous than the refugee standard. If an asylum seeker meets the credible fear standard, they are generally transferred to a location on land where a more in-depth refugee determination is done. Asylum officers receive extensive training on international and U.S. refugee law and standards. They are also trained in effective interviewing techniques and how to use country conditions information in making their decisions. Up-to-date information about country conditions in Haiti is made available to any asylum officer responsible for the screening of Haitian asylum seekers. The Department of State also regularly offers additional information that may be relevant to any such claim. In interdiction cases, the asylum officer recommends a decision, which must be reviewed in headquarters.

Q: Is it possible that Haitians who meet the criteria of refugees are being returned to Haiti because they are unaware of the legal requirements concerning refugees and do not voice their fear of persecution when interdicted? Do you agree or disagree with the proposal raised by one of the briefers on the second panel that, at a minimum, in-country processing in Haiti should be reinstated? What challenges or obstacles exist to the renewal of such an effort?

A: We are not aware of any interdicted Haitians who meet the refugee definition but were returned to Haiti by the United States. At this time, we do not believe that in-country processing for Haitians would be appropriate, as current country conditions do not warrant such action. In-country processing is an extraordinary undertaking that requires, among other things, a special determination by the President. We do not believe that the current circumstances for Haitians require renewal of such an effort.

Q: What steps does the U.S. take to monitor the status of those Haitians returned to Haiti? What efforts, if any, are undertaken to ensure that they are not subject to reprisal or persecution upon their return?
A: The U.S. Embassy in Port-au-Prince does not currently monitor the status of individual Haitians returned to Haiti; the Embassy, however, continues to monitor political and social conditions throughout the country. The Embassy's work in this regard is enhanced by its strong contacts with Haitian human rights organizations, which would alert the Embassy if interdicted migrants were being subjected to reprisals or persecution upon return.

Q: 3) Section 243(b)(3) of the Foreign Relations Authorization Bill Conference Report which the President signed into law September 30 requires reporting on "the extent to which the United States currently provides opportunities for resettlement in the United States of individuals who are close family members of citizens or lawful residents of the United States . . ." Is such an opportunity afforded to Haitian refugees? In light of this provision, will the Department be working with INS to address requests such as those articulated by one of the briefers on the second panel, that Haitian refugees be released locally to their families if they have family members here in the United States?
A: Access to the U.S. refugee program is determined by categories called Priorities established by the Department of State. Like all others, Haitians are eligible for this program under the Priority One category, which requires that either UNHCR or an Embassy refer the person to the program. The criteria for access to the U.S. refugee program are distinct from the criteria used by INS to determine whether to release from detention an asylum-seeker in the United States. The former involves determining whether an individual is in need of immediate resettlement to the United States, while the latter requires determining, under Section 212(d)(5) of the Immigration and Nationality Act, whether to release an alien.

Q: 4) The United Nations High Commissioner for Refugees, Ruud Lubbers, said in a statement earlier this year that U.S. domestic policy regarding the treatment of Haitian refugees "amounts to arbitrary detention" and that it goes against "the norms and

principles of international law." Given the Department's role in reporting U.S. adherence to international agreements and standards, how would you rate the current detention policy?
A: The Department of State believes that INS detention practices comply with all applicable international agreements and standards regarding refugees and asylum seekers.

Q: In light of reports of rapes, for example, by INS guards of Haitian women at the Krome Detention Center, and the key role the U.S. played in pressing for an investigation on sexual exploitation of refugees in West Africa, what efforts has the Department undertaken with INS to address this grave matter and ensure the safety and well-being of the detainees? Given the U.S. role in working toward a code of conduct to be implemented by UN personnel and NGOs involved in refugee work, is the Department working with the INS toward such a code of conduct for the treatment of refugees in the U.S.?
A: The Department of State is in regular communication with INS regarding the standards and procedures for the treatment of asylum seekers and refugees in the United States. The INS has adopted guidelines governing the detention of asylum seekers and believes that these guidelines appropriately address issues relating to their treatment in detention. These detention standards mandate that each facility have a grievance procedure whereby detainees are able to file formal complaints and appear before a committee to present their case. In addition, when a detainee makes an allegation of serious official misconduct, such as rape, the INS Office of Internal Audit must be notified as well as the Office of the Inspector General of the Department of Justice. These offices are responsible for conducting investigations of alleged misconduct.

Q: Please describe the role of U.S. personnel stationed at our Caribbean posts in providing for the safety of Haitian refugees in these third countries. Please describe both bilateral efforts with the host governments, as well as the relationship with UNCHR personnel in these countries.
A: Providing for the safety of Haitian refugees in third countries is normally the responsibility of the authorities in those countries. U.S. personnel stationed at our Caribbean posts engage with the host

governments on a broad range of issues, including refugees, human rights, and migrant populations when there are issues of concern.

We are not aware of any significant numbers of Haitian refugees or applicants for political asylum in other Caribbean nations. There are, however, significant numbers of Haitian migrants in the Dominican Republic and the Bahamas. These countries determine who among these populations are refugees according to their domestic legislation and international agreements and standards. UNHCR covers refugee protection issues in the Caribbean from its office in Washington: UNHCR recently sent a Washington representative to the Dominican Republic for six weeks to look into the condition and circumstances of Haitians there. It also has a group of "honorary liaisons" (private persons who report to UNHCR relevant developments on refugees) throughout the region. The Department, through the Bureau of Population, Refugees and Migration, is in regular contact with the UNHCR office in Washington regarding the treatment of Haitians and other non-citizens, who may be asylum seekers or refugees in a Caribbean host country.

* * * *

3. U.S.-Canada Agreement Covering Third-Country Asylum Claims at the Border

On December 5, 2002, the United States and Canada signed the Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries. The agreement provides that each country may return to the other country individuals claiming refugee status at a land border port of entry. As a result, third-country nationals arriving at the U.S. land border from Canada may, with certain exceptions, be returned to Canada and vice versa. The country to which the individual is returned will then adjudicate the refugee status claim. The agreement includes, consistent with U.S. humanitarian tradition, a broad exception to such return for the purpose of promoting family reunification, especially for those who are transiting the United States to join families in Canada.

Under U.S. law the agreement is consistent with the Immigration and Nationality Act, which provides an exception to the right of an alien to apply for asylum where, pursuant to a bilateral or multilateral agreement, the alien may be removed to a country where the alien's life or freedom would not be threatened on account of one of five grounds for granting asylum and where the alien would have access to a "full and fair procedure for determining a claim to asylum." 8 U.S.C. § 1158(a)(2)(A). Both the United States and Canada have such procedures, which fully comply with requirements of the 1967 Protocol Relating to the Status of Refugees for determining claims for refugee status and for observing the obligation not to return refugees to a country where they would face persecution (non-refoulement). In addition, Article 6 of the agreement provides that either country may at its own discretion examine any refugee status claim made to that country where it determines that it is "in its public interest to do so." Excerpts below set forth other key articles of the agreement.

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

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* * * *

Article 1

1. In this Agreement,

A) "Country of Last Presence" means that country, being either Canada or the United States, in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry.

* * * *

D) "Refugee Status Claimant" means any person who makes a refugee status claim in the territory of one of the Parties.

E) "Refugee Status Determination System" means the sum of laws and administrative and judicial practices employed

by each Party's national government for the purpose of adjudicating refugees' status claims.

* * * *

2. Each Party shall apply this Agreement in respect of family members and unaccompanied minors consistent with its national law.

Article 2

This Agreement does not apply to refugee status claimants who are citizens of Canada or the United States or who, not having a country of nationality, are habitual residents of Canada or the United States.

Article 3

1. In order to ensure that refugee status claimants have access to a refugee status determination system, the Parties shall not return or remove a refugee status claimant referred by either Party under the terms of Article 4 to another country until an adjudication of the person's refugee status claim has been made.
2. The Parties shall not remove a refugee status claimant returned to the country of last presence under the terms of this Agreement to another country pursuant to any other safe third country agreement or regulatory designation.

Article 4

1. Subject to paragraphs 2 and 3, the Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry on or after the effective date of this Agreement and makes a refugee status claim.
2. Responsibility for determining the refugee status claim of any person referred to in paragraph 1 shall rest with the Party

of the receiving country, and not the Party of the country of last presence, where the receiving Party determines that the person:

(a) Has in the territory of the receiving Party at least one family member who has had a refugee status claim granted or has been granted lawful status, other than as a visitor, in the receiving Party's territory; or
(b) Has in the territory of the receiving Party at least one family member who is at least 18 years of age and is not ineligible to pursue a refugee status claim in the receiving Party's refugee status determination system and has such a claim pending; or
(c) Is an unaccompanied minor; or
(d) Arrived in the territory of the receiving Party:
    (i) With a validly issued visa or other valid admission document, other than for transit, issued by the receiving Party; or
    (ii) Not being required to obtain a visa by only the receiving Party.

3. The Party of the country of last presence shall not be required to accept the return of a refugee status claimant until a final determination with respect to this Agreement is made by the receiving Party.
4. Neither Party shall reconsider any decision that an individual qualifies for an exception under Articles 4 and 6 of this Agreement.

Article 5

In cases involving the removal of a person by one Party in transit through the territory of the other Party, the Parties agree as follows:

(a) Any person being removed from Canada in transit through the United States, who makes a refugee status claim in the United States, shall be returned to Canada to have the refugee status claim examined by and in accordance with the refugee status determination system of Canada.

(b) Any person being removed from the United States in transit through Canada, who makes a refugee status claim in Canada, and:
   (i) whose refugee status claim has been rejected by the United States, shall be permitted onward movement to the country to which the person is being removed; or
   (ii) who has not had a refugee status claim determined by the United States, shall be returned to the United States to have the refugee status claim examined by and in accordance with the refugee status determination system of the United States.

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4. North Korean Refugees

On June 21, 2002, Arthur E. Dewey, Assistant Secretary of State for the Bureau of Population, Refugees and Migration, testified before the Senate Judiciary Subcommittee on Immigration. His testimony, excerpted below, addressed concerns about China's actions regarding thousands of North Koreans crossing into China searching for food or work or fleeing persecution. He also addressed the challenges posed by North Koreans seeking refuge in embassies and consulates and explained that U.S. diplomatic personnel cannot grant asylum on a U.S. diplomatic compound. Asylum in the United States can be requested only by an applicant who is physically present in the United States or at a U.S. border.

The full text of Assistant Secretary Dewey's testimony is available at *http://usinfo.state.gov/regional/ea/easec/dewey.htm*.

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As you know, the Democratic People's Republic of Korea (DPRK) is among the most repressive regimes in the world. . . .

* * * *

Accordingly, we remain extremely concerned about the thousands of North Koreans who have crossed into China in search of food and work or to flee persecution. We are aware that China has historically allowed the presence of North Koreans in China and recognize that many seek only temporary shelter in China and then return voluntarily to North Korea. That said, we are also aware that all unauthorized border crossing are crimes that leave returnees vulnerable to persecution. Because of this, we are troubled by China's refusal to grant the UN High Commissioner for Refugees (UNHCR) access to the region to determine who among the DPRK migrants may require protection as refugees. We are particularly concerned by continuing reports that North Korean are being forced back from China to North Korea where they may face harsh punishment and according to some reports, execution. In recent days, we, as well as other nations, are also faced with a new phenomenon where North Koreans have begun taking desperate measures, including scaling walls of embassies and consulates in Beijing and Shenyang, seeking refuge. Given the heightened security situation throughout the world, you can see how these desperate measures further exacerbate an already distressing and dangerous situation. But I feel it's important to reiterate that there are no guarantees for North Koreans who seek refuge in third country diplomatic compounds and they are putting themselves at great risk. In a post 9–11 world, no diplomatic compound will tolerate unidentified persons breaking through security for any reason. Moreover, it's also important to note that U.S. diplomatic personnel are not authorized to grant asylum to asylum seekers entering a U.S. compound. Under U.S. law, asylum in the United States can be requested only by an applicant who is physically present in the United States or at a U.S. border. It cannot be requested on an individual's behalf, or by a third party. The U.S. does not grant "diplomatic asylum," which the United States does not recognize as a rule of international law.

That said, we are pleased that most cases involving North Koreans have been resolved through bilateral negotiations with the Government of China for onward resettlement to South Korea, where they are entitled to citizenship. Nonetheless, 20 still remain in the South Korean Embassy awaiting safe passage to South Korea

and 2 remain in the Canadian Embassy. One person forcibly removed from the South Korean Embassy remains in Chinese hands.

We are also extremely concerned that Chinese police entered uninvited onto the premises of the South Korean Embassy in Beijing. We regard the inviolability of diplomatic and consular premises as a bedrock principle that is essential to the conduct of international relations, and we expect all nations to abide absolutely by their solemn legal obligations regarding such inviolability under the Vienna conventions.

Under normal circumstances where the host government has made it possible for people to claim asylum in-country, and/or allowed UNHCR access to persons of concern to conduct refugee status determinations, a person seeking resettlement in a third country should contact UNHCR, the lead UN organization that handles refugee protection. In most situations, the host government and/or UNHCR are able to address asylum requests, grant refugee status (if warranted), and ensure protection is provided to asylum seekers until their claims have been adjudicated. If third country resettlement is needed, in most cases U.S. policy is to accept from UNHCR referrals of cases which are then adjudicated by the U.S. Immigration and Naturalization Service (INS) to determine if the person is a refugee and admissible under our law. For security reasons, however, U.S. officials in the field will not consider UNHCR resettlement referrals of North Koreans without prior Department of State and INS approval. This policy has been in effect since the mid-1990s.

The Office of the High Commissioner in Beijing has the mandate to determine what protection or assistance these people may need while in the PRC. We are continuing to urge China to adhere to their international obligations in the 1967 Protocol relating to the status of refugees and to cooperate with the UNHCR to ensure protection for those DPRK migrants that may qualify for refugee status. The Department is also currently in the midst of a policy review on North Koreans in China.

As far as our refugee admissions program is concerned, I believe you are aware that it was hard hit in the aftermath of September 11, as we made the difficult adjustments to assure its integrity and

to ensure our security as a nation. Nonetheless, even in the context of the current war, this Administration remains committed to keeping the door open to refugees.

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Chapter 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

1. Consular Notification and U.S. Criminal Prosecution

a. In U.S. courts: Javier Suarez Medina

Javier Suarez Medina, a Mexican national, was arrested in December 1988 for killing an undercover narcotics officer with an Uzi submachine gun during a controlled drug transaction. He was tried in 1989, convicted of murder in the course of committing or attempting to commit a robbery, and sentenced to death. The Government of Mexico first contacted the Department of State concerning Mr. Suarez in 1997, stating that it had not learned of Mr. Suarez's case until after his conviction. On December 12, 1997, David R. Andrews, then Legal Adviser to the U.S. Department of State, wrote to George W. Bush, then governor of Texas, transmitting a diplomatic note received from the Government of Mexico asserting that Suarez, a Mexican national, had not been informed of his right to have a Mexican consular official notified of his detention, in violation of Article 36 of the Vienna Convention on Consular Relations and Article VI of the Consular Convention in effect between Mexico and the United States of America.

Suarez's execution was postponed and ultimately rescheduled for August 14, 2002. In the meantime, the

International Court of Justice had issued its decision in *LaGrand (Germany v. U.S.)*, 1999 I.C.J. 28 (March 5), regarding remedies in certain cases involving violations of Article 36 of the Vienna Convention. *See Digest 2000* at 43–93; *Digest 2001* at 21–24.

Following a further exchange of diplomatic notes between the Embassy of Mexico and the U.S. Department of State, William H. Taft, IV, Legal Adviser for the U.S. Department of State, wrote to Gerald Garrett, chairman of the Texas Board of Pardons and Paroles, which was then considering a clemency petition on behalf of Suarez. The letter, dated August 5, 2002, requested that the Board give specific attention to the failure of Texas authorities to advise Mr. Suarez of the right to have consular officials notified of his arrest and to representations made by the Government of Mexico on Suarez's behalf. The letter noted the ICJ decision in *LaGrand* and stated that "a careful consideration" by the Board of the conviction and sentence of Suarez in light of the rights set forth in the Vienna Convention would be consistent with the "review and reconsideration" of such rights described by the ICJ in *LaGrand*. The letter attached a copy of a Mexican diplomatic note of July 17, 2002 and the *LaGrand* decision. The text of the letter is set forth below in full.

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The Department of State understands that the Board is currently considering a clemency petition on behalf of Javier SUAREZ Medina, a Mexican national scheduled for execution on Wednesday, August 14, 2002.

The Government of Mexico has written the Department about this case to express its concern that Mr. Suarez was not advised at the time of his arrest of his right to have a Mexican consular official notified of his detention. Under Article 35(1)(b) of the Vienna Convention on Consular Relations ("Vienna Convention"), a treaty to which the United States and Mexico are parties, a foreign national who is arrested or detained must be so notified

"without delay." The Department of State places great importance on our consular notification obligation, the reciprocal observance of which serves to protect all Americans who travel or live abroad. We have worked closely with the State of Texas in recent years to improve compliance with this obligation by state and local officials.

We have also been in touch with the Office of the Governor for the State of Texas about this case since 1997, when it first came to our attention. According to information we received from the Governor's office in 1998, arresting and detaining officials in Dallas learned that Mr. Suarez was a Mexican citizen shortly after his 1988 arrest, in the course of his tape-recorded confession. We understand that Mr. Suarez nevertheless was not advised of his right to request consular assistance from Mexican consular officials at any time prior to his trial. The information available to us at this time indicates that Mexican consular officials first learned about Mr. Suarez's case shortly after his sentencing.

The information we have received from Texas authorities indicates that there was a failure to comply with the consular notification obligation of Article 36(1) of the Vienna Convention. If Mr. Suarez had been so advised, in accordance with the Convention's requirements, and then requested that Mexican consular officials be notified, it would have been incumbent upon Texas authorities to notify the nearest Mexican consulate of the fact of Mr. Suarez's detention, so that the consulate could have provided whatever consular assistance it deemed appropriate. In view of the above facts, the Department of State will convey to the Government of Mexico on behalf of the United States the Department's deepest regrets over the failure of consular notification in this case.

In addition, we understand that the Board has before it a pending clemency request for Mr. Suarez that raises the issue of consular notification. We respectfully request that, in the course of its careful consideration of this petition, the Board give specific attention to the failure of authorities to provide Mr. Suarez with consular notification pursuant to Article 36 of the Vienna Convention. We further request that the Board also give specific consideration to the representations made by the Government of Mexico on Mr. Suarez's behalf.

In this regard, we also wish to call the Board's attention to the decision of the International Court of Justice in *Germany v. United States (LaGrand)*, a case in which the Federal Republic of Germany contended that the United States violated Article 36 of the Vienna Convention in connection with the arrest trial and execution by the State of Arizona of the two LaGrand brothers, who were German nationals. In that case, as in the case of Mr. Suarez, it was not disputed that the United States had not acted in accordance with the requirements of Article 36(1). In its decision, the Court also stated that, under the circumstances presented, Article 36(2) was violated "by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers. . . ."

It is with these points in mind that the Department respectfully requests that, as part of the Board's consideration of Mr. Suarez's petition, it specifically consider in light of the rights set forth in the Vienna Convention, the conviction and sentence of Mr. Suarez. We believe that, in light of the unique role of the Texas Board of Pardons and Paroles, a careful consideration of this issue by the Board would be consistent with the "review and reconsideration" described by the International Court of Justice in its decision construing the Vienna Convention in *LaGrand*. We recommend that, in rendering its decision, regardless of the outcome, the Board consider preparing a written statement setting out the Board's consideration of this issue. Such a written statement would be useful in establishing that the Board in fact reviewed and reconsidered Mr. Suarez's conviction and sentence in light of the failure of consular notification, should that be necessary in any subsequent legal proceedings.

I enclose copies of the correspondence the Department has received from the Government of Mexico and the Court's decision in *LaGrand*. At the suggestion of your staff, we are providing copies of this letter separately to all Board members.

Thank you for your careful attention to this important issue.

Also on August 5, Mr. Taft sent a copy of the letter and attachments to Governor Rick Perry. On August 6, 2002,

Mr. Taft forwarded to the Board a copy of a further diplomatic note received that day from the Government of Mexico in which the Government of Mexico detailed the efforts of its consular officials to learn the nationality of Mr. Suarez and urged a stay of execution.

In a letter of August 14, 2002, excerpted below, the chairman of the Texas Board of Pardons and Paroles responded to the Legal Adviser. The letter described the power of the Board and the information reviewed by the Board in reaching its decision by a vote of 17 to 0 not to recommend to the governor of Texas a commutation or lesser penalty, and by 16 to 1, not to recommend a 90-day reprieve of execution. Mr. Suarez was executed as scheduled on that date.

The full texts of the communications between the Legal Adviser and the Board and Governor Perry are available at *www.state.gov/s/l/c8183.htm*.

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. . . Under Article 4, Section 11 of the Texas Constitution, the Board has broad authority to review all information relevant to an individual's conviction and sentence and to recommend that the Governor grant *inter alia* a full pardon, pardon for innocence, reprieve of execution, or commutation of sentence to a lesser penalty (including time served.)

Under the Texas Constitution, the Board of Pardons and Paroles by a written vote of a majority of all the Board members (17 at present) may recommend that the Governor grant clemency. In death penalty cases, without the written recommendation of the Board members, the Governor is limited to granting a one-time, 30-day reprieve of execution.

In furtherance of exercising that authority, the Board members may consider any and all information provided, even information that was not available to the courts or that was not considered by the courts at trial or on appeal. The Board does not place any limitations on the information which may be submitted by the inmate or interested parties, and by law solicits input from the state prosecutor, the trial judge, and law enforcement, and survivors

of the victim of the crime. The Board members also consider letters of support and protest from other interest groups and from the general public.

In this instance, Javier Suarez Medina had requested through his attorney Lydia Brandt a commutation of the death sentence to a lesser penalty or a 90-day reprieve of the execution date. The petition was received on July 22, 2002. The Board members on August 13, 2002, completed their review of Mr. Medina's clemency petition and decided by a vote of 17 to 0 *not* to recommend to the Governor a commutation of the sentence to a lesser penalty. The Board members also decided by a vote of 16-1 not to recommend that the Governor issue a 90-day reprieve of execution.

The Board members have been provided authority under the Texas Constitution to recommend that the Governor grant relief if they decide it is appropriate, for example, if Javier Suarez Medina had been prejudiced by the apparent failure of Dallas County law enforcement officials to inform him of his right to request Mexican Consular assistance.

The Board has in place a process for full consideration of petitions for clemency from death row inmates (see 37 TAC §§ 45.43 and 143.57), which include full opportunity for the inmate or attorney to present information in writing (including videotapes) to the Board. Those rights include an interview with a Board member designated by the Chair. Mr. Medina's attorney requested such an interview for him. A Board member interviewed Mr. Medina, and a summary was distributed to each Board member for consideration.

In this particular case, Mr. Medina and his attorney had a full opportunity to provide all available information to the Board members. As indicated in my prior letter, the Board members had before them and carefully evaluated information from not only Javier Suarez Medina through his attorney, Lydia Brandt, but also from the Mexican Consular Officials, presented through their attorney Sandra Babcock, on the requirement of consular notification under Article 36 of the Vienna Convention on Consular Relations.

Other information was received and considered as well as from the Dallas County Criminal District Attorney, the judge of the Dallas County Criminal District Court Number Two, the Dallas

County Sheriff, and the Dallas Chief of Police, as well as many letters of support and protest from interest groups and the public.

On August 8, 2002, along with the Board's General Counsel and Clemency staff, I met in my official capacity with Mexican Consular Officials and Ms. Babcock. From representations made, this meeting was requested with the full knowledge and consent of Mr. Medina's attorney, Lydia Brandt. Mexican Consular Officials present at the meeting were Mr. Francisco Javier Alejo, Consul General, and Mr. Vicente Sanchez, Deputy Consul, both from Austin. Also present was Ms. Sandra Babcock, their Legal Counsel.

During the meeting, which lasted over one hour, Mr. Alejo and Ms. Babcock made detailed oral presentations, and provided supporting documentation, including affidavits, with emphasis and specific discussion on the concerns of the Mexican Government regarding the apparent violation of the consular notification requirement of Article 36 of the Vienna Convention on Consular Relations.

Following the meeting, I requested that Ms. Babcock submit a synopsis of her presentation on behalf of the Mexican Government at the meeting. She did submit this letter, and Board members were provided a copy. They reviewed and considered the supplemental information. In addition, following the meeting, in order to give the Board members adequate time to review and consider the material submitted on the consular notification issue, I made the decision to extend the earlier request for written . . . submissions to Tuesday, August 13 (from Monday, August 12).

In summary, all 17 Board members received and carefully reviewed information from attorneys for Mr. Medina and from officials of the Mexican Consulate, including the materials regarding consular notification under Article 36 of the Vienna Convention on Consular Relations.

* * * *

b. Gerardo Valdez

In 2001, William H. Taft, IV, Legal Adviser of the Department of State, wrote to the Oklahoma Pardon and Parole Board

and Governor Frank Keating of Oklahoma concerning consideration of a petition for clemency on behalf of Gerardo Valdez, a Mexican national convicted of murder and sentenced to death. *Valdez v. Oklahoma*, Okla. Crim. App. No. PCD-2001-1011. Valdez had been arrested in July 1989 and, according to the office of the Attorney General of Oklahoma, arresting and detaining officials had learned that he was a Mexican citizen within a day of his arrest. The Government of Mexico contacted the Department of State indicating that it had only become aware of Valdez's detention in April 2001.

In a letter to Governor Keating of June 13, 2001, Mr. Taft drew attention to the lack of consular notification in violation of the Vienna Convention on Consular Relations ("VCCR") and requested that he give careful consideration to a pending clemency request by Valdez. In a subsequent letter of July 11, 2001, following the decision by the ICJ in *LaGrand*, Mr. Taft specifically requested the governor to consider whether the VCCR violation had had any prejudicial effect on Mr. Valdez's conviction or sentence. After a full consideration of all factors, including the lack of consular notification, Governor Keating denied clemency on July 20, 2001, and explained his decision in a letter to the President of Mexico. *See Digest 2001* at 24–31.

On August 22, 2001, Valdez filed a second petition for post-conviction relief in the Court of Criminal Appeals for the State of Oklahoma. The court granted an accompanying motion of the Mexican government to file an *amicus* brief and stayed the order of execution pending the outcome of the post-conviction proceedings. On May 1, 2002, the court granted the petition and remanded the case to the District Court of Grady County for resentencing. 46 P.3d 703 (Okla. Crim. App. 2002). In doing so, the court rejected Valdez's claims that, under the ICJ decision in *LaGrand*, rules of procedural default could not be applied in the case. In the court's view, this argument was foreclosed by the U.S. Supreme Court's *per curiam* decision in *Breard v. Greene, 523 U.S. 371 (1998)*. The Oklahoma court concluded, however,

that new evidence provided by the Mexican government on Valdez's social, mental, and health history provided a basis for concluding that Valdez had been denied effective assistance of counsel in his criminal case. Resentencing was pending at the end of 2002. Excerpts below from the court of appeals opinion provide its analysis.

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* * * *

The 1995 Amendments to the Capital Post-Conviction Procedure Act greatly circumscribed this Court's power to apply intervening changes in the law to post-conviction applications. (citation omitted). Now under the Act, for an alleged intervening change in the law to constitute sufficient reason for raising a claim in a subsequent proceeding to secure relief, a petitioner must show the intervening change in the law was unavailable at the time of his direct appeal or his direct appeal or his original application. 22 O.S. 2001 § 1089(D)(9). This Petitioner cannot do.

* * * *

. . . Whether the treaty creates individually enforceable rights or not, the United States Supreme Court in *Breard* [v. *Greene*, 523 U.S. 371 (1998)] specifically rejected the contention that the doctrine of procedural default was not applicable to provisions of the Vienna Convention and until such time as the supreme arbiter of the law of the United States changes its ruling, its decision in *Breard* controls this issue. Petitioner cannot be afforded review under our statues on the ground that the ICJ's interpretation of the Convention in *LaGrand* constitutes a new rule of constitutional law.

* * * *

. . . It is evident from the record before this Court that the Government of Mexico would have intervened in the case, assisted with Petitioner's defense, and provided resources to ensure that he received a fair trial and sentencing hearing.

While we have no doubt the evidence discovered with the assistance of the Mexican Consulate could have been discovered

earlier, under the unique circumstances of this case, it is plain that the evidence was not discovered due to trial counsel's inexperience and ineffectiveness. . . .

Although this Court has addressed claims relating to trial counsel's effectiveness in his prior appeals, in those appeals, this Court was not presented with a claim that trial court failed to discover evidence relating to Petitioner's social, mental, and health history. This Court was not presented with a claim that trial counsel did not inform petitioner he could have obtained financial, legal and investigative assistance from his consulate. We believe trial counsel, as well as representatives of the State who had contact with Petitioner prior to trial and *knew* he was a citizen of Mexico, failed in their duties to inform Petitioner of his right to contact his consulate. In hindsight, and so many years following Petitioner's conviction and direct appeal, it is difficult to assess the effect consular assistance, a thorough background investigation and adequate legal representation would have had. However, this Court cannot have confidence in the jury's sentencing determination and affirm its assessment of a death sentence where the jury was not presented with very significant and important evidence bearing upon Petitioner's mental status and psyche at the time of the crime. Absent the presentation of this evidence, we find there is a reasonable probability that the sentencer might "have concluded that the balancing of aggravating and mitigation circumstances did not warrant death." Strickland [v Washington.] 466 U.S. [668] at 695.

* * * *

2. Inter-American Commission on Human Rights: Case of Ramon Martinez Villareal

On October 15, 2001, the Inter-American Commission on Human Rights issued a preliminary report with respect to Ramon Martinez Villareal, pertaining to his conviction and sentencing to capital punishment. Commission Report No. 114/01. The United States submitted comments on the preliminary report, dated December 26, 2001. In that submission, set forth in full below, the United States argued

that the petition should be dismissed and the preliminary report withdrawn. It also addressed the Report's conclusion that the petitioner's conviction and sentence were inherently flawed because of lack of consular notification at the time of his arrest.

The United States has reviewed the Commission's Report No. 114/01, including the two recommendations included therein. As the United States has previously indicated, the petition submitted in Case No. 11.753 should have been deemed inadmissible for, *inter alia*, the following reasons:

1. The American Declaration on the Rights and Duties of Man ("Declaration") is no more than a recommendation to the American States that does not create legally binding obligations. Therefore, the Declaration cannot be "violated" as that term is used in the Report.
2. Even if it were possible for a State to "violate" the Declaration, the petition does not state facts that would constitute a violation of any provision of the Declaration.
3. The meaning and extent of U.S. obligations pursuant to the Vienna Convention on Consular Relations does not fall within the competence of the Commission.

On this basis, the United States respectfully requests that the Commission reconsider the legal basis of its conclusions and recommendations, withdraw Report No. 114/01, and order the petition dismissed.

The United States notes that this case concerns a petitioner who has raised numerous arguments as to why he allegedly did not receive a fair trial or due process in connection with his conviction and sentence of capital punishment for two murders committed in the course of a robbery. The Petitioner does not claim that he did not kill the two victims involved. His claims, including claims that he did not understand the proceedings against him and that his due process rights were violated, have been fully reviewed by the courts of the United States. The question of his

mental competency has been carefully reviewed by the courts of the United States. He continues to seek relief through domestic procedures available to him.

Notwithstanding the extensive protections petitioner has been accorded, the Report concludes that petitioner's conviction and sentence are inherently flawed because he was not advised at the time of his arrest that he could request consular assistance from Mexico. Such notification was required under Article 36 of the Vienna Convention on Consular Relations. The United States finds the reasoning of the Report in this respect unpersuasive and unsupported by relevant precedent. To the extent that the Report adopts the views of the Inter-American Court of Human Rights expressed in that Court's advisory opinion OC-l6, the Commission should be aware that the United States fundamentally disagrees with the Court's reasoning and conclusions in that proceeding. Accordingly, the United States does not agree with the Report insofar as it is premised on the assumption that any benefits accruing to Mr. Villareal under Article 36(1)(b) of the Vienna Convention on Consular Relations "constituted a fundamental component of the due process standards to which he was entitled under Articles XVIII and XXVI of the American Declaration." Likewise, the United States does not agree with the Report's conclusion that the failure to advise Mr. Villareal of his right to consular notification in accordance with Article 36(1)(b) of the Vienna Convention "constituted [a] serious violation[] of Mr. Martinez Villareal's rights to due process and to a fair trial under these provisions."

As noted in the United States' submission before the Inter-American Court of Human Rights in OC-l6, as well as previous submissions to the Commission in this case, the consular notification obligation of the Vienna Convention establishes neither a prerequisite for the observance of human rights in criminal cases, nor an independent source of individual human rights. The Commission itself concedes in Paragraph 59 of its Report that it "does not consider that it has competence to adjudicate upon the State's responsibility for violations of the Vienna Convention on Consular Relations per se." To the extent that the Report nevertheless suggests that a violation of the obligations of Article

36 of the Vienna Convention requires that a criminal defendant be accorded a new trial or set free, it is unsupported by competent legal authority and beyond the appropriate scope of the Commission's competence.

The United States nevertheless reiterates that it takes its obligations under the Vienna Convention regarding consular notification and access very seriously. Since 1998, the United States has undertaken an intensive effort to improve compliance by Federal, state and local government officials. That effort is ongoing and has been permanently institutionalized. The Department of State has published a 72-page booklet (Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, 1998), a pocket card reference card for arresting officials, and a training video to assist with this effort, and continues to work closely with state as well as federal officials to ensure compliance with consular notification obligations.

On October 10, 2002, the Inter-American Commission on Human Rights issued its final report in the case. Commission Report No. 52/02, Case No. 11.753. The IACHR ratified its conclusion and reiterated its recommendations set forth in the preliminary report, that the United States:

1. Provide Mr. Martinez Villareal with an effective remedy, which includes a re-trial in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration or, where a re-trial in compliance with these protections is not possible, Mr. Martinez Villareal's release.
2. Review its laws, procedures and practices to ensure that foreign nationals who are arrested or committed to prison or to custody pending trial or are detained in any other manner in the United States are informed without delay of their right to consular assistance and that, with his or her concurrence, the appropriate

> consulate is informed without delay of the foreign national's circumstances, in accordance with the due process and fair trial protections enshrined in Articles XVIII and XXVI of the American Declaration.

Villareal's sentence in Arizona was commuted to life imprisonment.

B. CHILDREN

1. International Child Abduction

a. Visa ineligibility for international child abduction

In a telegram of October 28, 2002, the Department of State provided guidance to all diplomatic and consular posts abroad to remind posts of visa ineligibility provisions pertaining to aliens involved with international child abductions to countries with whom the United States does not have a treaty relationship under the Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. 11670 ("Hague Convention"). Excerpts below set forth the legal requirements to deny visas in certain circumstances.

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

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2. VISA INELIGIBILITY AND CHILD ABDUCTION: As posts are aware, the Department of State is committed to the principle that the removal from or retention of a child outside his or her country of habitual residence is wrong. When available, we rely on the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") to facilitate the return of abducted children. The [Immigration and Nationality Act ("INA")] is designed to use visa ineligibility

to help persuade abductors and others to return abducted children to the U.S. in situations where the Hague Convention is unavailable.

3. INADMISSIBILITY UNDER 10(C): An alien may be ineligible for a visa under the INA's section 212(a)(10)(C) ("10(C)") for one of four reasons. First, 10(C)(i) makes inadmissible any alien who detains or withholds custody of an Amcit child outside the United States in violation of a custody order issued by a U.S. Court. Second, 10(C)(ii)(I) makes inadmissible persons known by the Secretary of State to have intentionally assisted such an alien. Third, 10(C)(ii)(II) applies to persons known by the Secretary of State to have intentionally provided material support or safe haven to such an alien. Finally, 10(C)(ii)(III) permits the Secretary of State to designate as inadmissible specified relatives or agents of such an alien. Each of these provisions is subject to the exceptions contained in 10(C)(iii) relating to certain government officials and cases covered by the Hague Convention.

4. STRICT RULE UNDER 10(C)(i): Once post determines that an alien who is applying for or is in possession of [a nonimmigrant visa] falls within the provisions of 10(C)(i), and that none of the exceptions apply, post must find the alien inadmissible. This means that posts must refuse the visa or initiate visa revocation, unless the ineligibility is waived. Post may not condition a determination of inadmissibility under 10(C)(i) on any considerations other than whether the alien as a matter of fact is subject to the ineligibility.

5. DEPARTMENTAL AUTHORITY UNDER 10(C)(II): The INA's sections 10(C)(ii)(I)&(II) require that the Secretary of State know that a visa applicant described in these provisions has intentionally assisted or provided safe haven or support to a child abductor described in 10(C)(i) before the visa applicant can be declared inadmissible. The authority to make this factual determination has not been delegated to consular officers. Therefore, posts are not authorized to determine alone whether an alien is ineligible under these two subsections. Similarly, 10(C)(ii)(III) permits the Secretary of State to designate as inadmissible aliens who are related to or are agents of child abductors. Only the

Secretary has discretionary authority to designate aliens ineligible for visas under 10(C)(ii)(III); posts cannot make eligibility determinations with respect to these applicants.

* * * *

7. WAIVERS: The Department recognizes that there will be occasions when issuing a visa to an alien otherwise inadmissible under 10(C) might help secure return of an abducted child. In such a case, post may consider either a [INA §] 212(d)(3)(A) waiver or humanitarian parole; post cannot, however, decline to make an inadmissibility determination that is required by law.

* * * *

b. Definition of "custody" under Hague Convention on the Civil Aspects of International Child Abduction

On November 20, 2002, the U.S. Court of Appeals for the Ninth Circuit rejected assertion of custodial rights by a left-behind parent under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") on the basis of a "*ne exeat* clause" in a Mexican custody agreement. *Arce Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002). The couple in this case, both Mexican citizens, were married in Mexico in 1992 and had two children. The couple remained in Mexico; they separated in November 1998 and were divorced in 2000. The divorce agreement provided that the children would "remain under the custody and care" of their mother and that the father would have certain visitation rights. It also provided that the father "must grant full authorization according to law, until they reach adult age, on every occasion that his minor children . . . seek to leave the country accompanied by their mother . . . or any other person." According to the court of appeals, the parties agreed that this *ne exeat* clause was to be construed as "prohibiting Gutierrez [the mother] from taking the children out of the country without Arce's [the father's] permission." In February 2001 Gutierrez took the children from Mexico to

the home of her sister in San Diego, without the father's permission. Arce filed a petition for the return of the children under the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601–11610, which implements the Hague Convention in the United States. The U.S. District Court for the Southern District of California found that the children had been wrongfully removed in violation of the father's custody rights under the Convention and that no affirmative defenses to return had been established. It therefore ordered the children to be returned to Mexico. On appeal, the Ninth Circuit reversed, explaining its analysis of the custody issue as set forth in excerpts below (footnotes omitted).

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The "key operative concept" of the [Hague] Convention is that of "wrongful" removal. . . . Under the terms of the Convention, a child's removal is wrongful only if one of the parent's custody rights are breached.

Article 3 provides that a removal is wrongful if:

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Convention, art. 3. Since no wrongful removal exists without the possession of custodial rights by the parent seeking the child's return, the central question we must decide is whether Arce possesses custodial rights as understood under the Convention.

1. Text

Our inquiry begins with the text. . . . The Convention creates an explicit distinction between rights of custody and rights of access. Specifically, article 5 provides that:

For the purposes of this Convention—

a. "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
b. "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Convention, art. 5. Only a parent with rights of custody may petition a court for an order of return as provided in article 12, and as implemented in American law by ICARA. Convention, art. 12; 42 U.S.C. § 11603(b). Although an order of return is not available to him, a parent who holds only access or visitation rights does not lack a remedy. He may, under article 21, "submit an application to make arrangements for organizing or securing the effective exercise of rights of access" to the Central Authority of the State to which the child has been taken.

Here, Arce argues that he has custodial rights under the Convention because the ne exeat clause of the divorce agreement constitutes "the right to determine [his children's] place of residence." We reject the argument. The "right" granted under a ne exeat clause is, at most, a veto power. Croll v. Croll, 229 F.3d 133, 140 (2d Cir. 2000). A parent with custodial rights has the affirmative right to determine the country, city, and precise location where the child will live. This is one of the primary rights of a custodial parent. By contrast, a ne exeat clause serves only to allow a parent with access rights to impose a limitation on the custodial parent's right to expatriate his child.

* * * *

c. International Parental Kidnapping Crime Act

(1) Constitutional challenge under Commerce Clause

The International Parental Kidnapping Crime Act ("IPKCA"), 18 U.S.C. § 1204, criminalizes the "remov[al] of a child from

the United States or ret[ention] of a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights." In this case a father took two of his children by a prior marriage to Germany to live with him and his wife by a subsequent marriage. At the time, he had temporary custody of one of the children and no custody order pertaining to the second child. A German court denied the mother's petition pursuant to the Hague Convention to return the children. Subsequently, the father was indicted for four counts of kidnapping under the IPKCA and entered a conditional guilty plea to the two counts relating to retention in a foreign country. On appeal, the father argued that the retention provision of the IPKCA was unconstitutional because it did not fall within the Commerce Clause of the U.S. Constitution. The court of appeals upheld the conviction. *U.S. v. Cummings*, 281 F.3d 1046 (9th Cir. 2002). Excerpts below provide the court's analysis upholding the constitutionality of the statute.

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. . . The Commerce Clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3.

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The district court held that 18 U.S.C. § 1204(a) fell within Congress's ability to regulate the channels of commerce [one of three categories set forth in *U.S. v. Lopez*, 514 U.S. 549, 558–559 (1995)] Specifically, the statute criminalizes the actions of one who "removes a child from the United States or retains a child (who has been in the United Sates) outside the United States with intent to obstruct the lawful exercise of parental rights." 18 U.S.C. § 1204(a). By its terms, a child retained in a foreign country has to have been taken from the United States to another country if § 1204(a) is to apply. Cummings could not wrongfully retain his children in Germany without traveling there by some means of foreign commerce.

Congress's power to regulate the use of the channels of commerce is well-established. . . .

[The father] argues that these principles do not speak to the constitutionality of the retention portion of § 1204(a) because they target conduct directly involved in the movement of people or things in commerce. He argues that once the movement ceases, the channels of commerce are no longer affected. . . . We are unpersuaded. The cessation of movement does not preclude Congress's reach if the person or goods traveled in the channels of foreign commerce. . . . We are satisfied that Congress can act to prohibit the transportation of specified classes of persons in foreign commerce and thus proscribe conduct such as retention of those persons, even though transportation is complete.

Not only does 1204(a) target activity after the use of channels of foreign commerce is complete, but it also removes an impediment to the use of those channels. If a child is wrongfully retained in a foreign country, he or she cannot freely use the channels of commerce to return.

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(2) Constitutional challenge under the Fifth Amendment

On February 13, 2002, the U.S. District Court for the District of Massachusetts denied a motion to dismiss an indictment against an Indian national father who was charged with violating the IPKCA by taking his two minor children to India. The court rejected the father's claim that the IPKCA violated his right to equal protection under the Fifth Amendment to the U.S. Constitution on the ground that it criminalizes his conduct because of his nation of origin. The father argued that, because he is from India, a country not party to the Hague Convention, he cannot take advantage of the fact that the statute encourages use of civil remedies under the Hague Convention. Section 1204(d), on which the challenge relied, provides "This section does not detract from The Hague Convention on the Civil Aspects of International

parental Child Abduction, done at The Hague on October 25, 1980." The district court concluded:

> Of course, it would be the preferred route in these painful international child custody disputes to attempt a civil, rather than criminal, resolution. However, with countries (like India) that are not signatories, an international civil remedy through the Hague Convention's mechanisms is not available, and criminal prosecution is an effective recourse to deter child kidnapping. IPKCA is a rational tool for fulfilling the "enforcement-gap-closing" function. [*U.S. v. Amer*,] 110 F.3d 873, 882 (2d Cir. 1997).

2. Consular Assistance for Children

In a telegram of August 28, 2002, the Department of State provided guidance concerning consular assistance for an American citizen mother and child, possibly living on the streets in Brussels, Belgium. As set forth in excerpts below from the telegram, the Department also requested the post, if necessary, to report concerns to appropriate Belgian authorities to provide assistance and protection.

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2. Post should attempt to contact [the mother] and verify her and [the daughter's] well-being. Please explore prospects for locating appropriate housing for the two, and schooling for [the daughter]. Post should explain to [the mother] the types of consular services available. If Post cannot locate the two, or after speaking with [the mother], is concerned that [the daughter] may be at risk of physical harm or neglect, Post should contact an appropriate child protective services agency and request that it investigate and, if necessary, provide assistance and protective services for [the two].

3. The role of consular officers in protecting children is recognized in the Vienna Convention on Consular Relations (VCCR),

to which the U.S. and Belgium are parties. Article 5(h) of the VCCR specifically provides that consular functions include, "safeguarding . . . the interests of minors who are nationals of the sending state, particularly where any guardianship or trusteeship is required with respect to such persons."

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Cross Reference

International recovery of child support, **Chapter 15.B.**

Chapter 3

International Criminal Law

A. EXTRADITION AND OTHER RENDITIONS, AND MUTUAL LEGAL ASSISTANCE

1. New Bilateral Extradition, Mutual Legal Assistance, and Stolen Vehicle Treaties

On September 19, 2002, the Senate Committee on Foreign Relations held a hearing to consider nine law-enforcement treaties that had been transmitted by the President for advice and consent to ratification. The group included extradition treaties with Lithuania, S. Exec. Rep. 107–13 (2002), and Peru, S. Exec. Rep. No. 107–12 (2002), and a protocol amending the extradition treaty with Canada, S. Exec. Rep. 107–19 (2002); five mutual legal assistance treaties ("MLATs"), with Belize, India, Liechtenstein, Ireland and Sweden, S. Exec. Rep. 107–15 (2002); and one treaty with Honduras on the return of stolen or embezzled vehicles and aircraft, S. Exec. Rep. 107–11 (2002). The Senate Foreign Relations Committee recommended that the Senate take favorable action on eight of the treaties before it and the Senate provided advice and consent to their ratification on November 14, 2002. 148 CONG.REC. S11,057–S11,059 (2002). The committee took no action with respect to the MLAT with Sweden due to concerns expressed over parental child abduction. In approving the other treaties, the Senate attached an understanding to the new extradition treaty with Peru and to all of the MLATS

concerning cooperation with the International Criminal Court. *See* C.2.d.(2). below.

Excerpts below from prepared statements of Samuel M. Witten, Deputy Legal Adviser, U.S. Department of State, and Bruce C. Swartz, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, describe the significance of the treaties at issue.

The full text of the hearing and of answers to questions for the record following the hearing are available in S. Hrng. 107–721, *Law Enforcement Treaties: Hearing Before the Senate Comm. On Foreign Relations*, 107th Cong. (2002) at *www.access.gpo.gov/congress/cong017.html.*

Mr. Witten:

. . . The treaties, which have been transmitted to the Senate for advice and consent to ratification, fall into three categories:

— extradition treaties with Lithuania and Peru and a Second Protocol amending the U.S.-Canada Extradition Treaty;

— mutual legal assistance treaties—or "MLATs"—with Belize, India, Ireland, Liechtenstein and Sweden;

— a treaty for the return of stolen vehicles and aircraft with Honduras. The Department of State greatly appreciates this opportunity to move toward ratification of these important assistance treaties first, followed by the stolen vehicle and aircraft treaty.

The growth in transborder criminal activity, especially terrorism, violent crime, drug trafficking, arms trafficking, trafficking in persons, the laundering of proceeds of criminal activity, including terrorist financing, organized crime and corruption, generally has confirmed the need for increased international law enforcement cooperation. Extradition treaties and MLATs are essential tools in that effort. The negotiation of new extradition and mutual legal assistance treaties is an important part of the Administration's many efforts to address international crime, and in particular the heightened incidents of international terrorism. One important measure to better address this threat is to enhance the ability of U.S. law enforcement officials to cooperate effectively with their overseas counterparts in investigating and prosecuting international

criminal cases. Replacing outdated extradition treaties with modern ones and negotiating such treaties with new partners is necessary to create a seamless web of mutual obligations to facilitate the prompt location, arrest and extradition of international fugitives. Similarly, mutual legal assistance treaties are needed to provide witness testimony, records and other evidence in a form admissible in criminal prosecutions. The instruments before you today will be important tools in achieving this goal.

Extradition Treaties

I will first address the pending extradition treaties. As you know, under U.S. law, fugitives can only be extradited from the United States pursuant to authorization granted by statute or treaty. The two new treaties and one protocol pending before the Committee will update our existing treaty relationships with two law enforcement partners and create a new treaty relationship with one partner. This is part of the Administration's ongoing program to review and revise older extradition treaty relationships, many of which are seriously outdated and do not include many modern crimes or modern procedures.

The new extradition treaty with Peru, signed at Lima July 26, 2001, will replace an outdated treaty signed in 1899. The new treaty represents a major step forward in law enforcement cooperation between the two countries. Certain features of the treaty are worth noting. First, the new treaty obligates each country to extradite its own nationals, a high priority for U.S. law enforcement authorities. For many years, Peruvian law prohibited the extradition of Peruvian nationals. Second, the new treaty replaces the old "list" of extraditable offenses with the modern "dual criminality" approach. Extraditable offenses are defined as those punishable under the laws in both countries by a sentence of more than one year or a more severe penalty. This modern approach allows extradition for a broader range of offenses and encompasses new ones, e.g., cyber crime, as they develop in the two countries, without having to amend the treaty.

The new extradition treaty with Lithuania, signed in October, 2001, is the first such treaty concluded with one of the Baltic

states since the dissolution of the Soviet Union a decade ago. The new extradition treaty, and an MLAT with Lithuania that entered into force in 1999, together constitute a fully-modernized bilateral law enforcement relationship that will be particularly valuable in combating organized crime.

Like the Peru treaty, the new treaty with Lithuania contains an obligation to extradite nationals to face justice in each other's courts, thereby overcoming the preexisting bar in Lithuania's criminal code. Lithuania is to be commended for becoming the most recent European country to recognize that the time has come to remove this historic obstacle in extradition relations with the United States.

The second protocol to the extradition treaty with Canada, signed at Ottawa January 12, 2001, allows for the temporary surrender of persons to stand trial in one State while still serving a sentence in the other State. This mechanism can be an important law enforcement tool in cases where an individual has committed serious crimes in both countries. Temporary surrender allows for the prompt trial of an accused person while witnesses and evidence are still available. Such a mechanism has become a standard feature in recent U.S. bilateral extradition treaties, and will be a useful addition to the 1971 treaty with Canada and the 1988 protocol, which addresses other issues. The second protocol will also streamline authentication requirements to take advantage of changes in Canadian law regarding the admissibility of extradition documents.

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Stolen Vehicle Treaty

The stolen vehicle treaty with Honduras is substantially the same as the five similar stolen vehicle treaties approved by this Committee two years ago in October 2000. Its negotiation had not yet been completed when those treaties—with Belize, Costa Rica, the Dominican Republic, Guatemala and Panama—were approved, so it could not be considered at that time.

Like those treaties, the Honduras treaty establishes procedures that can be used for the recovery and return of vehicles that are

documented in the territory of one party, stolen within its territory or from one of its nationals, and found in the territory of the other party. Like the parallel treaties already in force with Mexico, Costa Rica, Guatemala, and Panama, the Honduran treaty also provides for the return of stolen aircraft.

The U.S. insurance industry strongly supports these treaties, since U.S. insurers are typically subrogated to the ownership interests of U.S. citizens or businesses whose vehicles have been stolen and taken overseas. In fact, insurance industry representatives have informed us that these stolen vehicle treaties provide discernible improvements in the cooperation of the foreign authorities. The treaty should significantly improve and facilitate the return of U.S. vehicles from Honduras. Thank you, Madam Chairman. I will be pleased to answer any questions you or other members of the Committee may have.

Mr. Swartz:
The five MLATs before this Committee will expand the United States' complement of law enforcement mechanisms designed to strengthen our ability to obtain evidence and other forms of assistance from overseas in support of our criminal investigations and prosecutions. I realize the Committee has become acquainted with the significant benefits MLATs provide to the international law enforcement community since the first such treaty came into force in 1977. Accordingly, I will briefly review only some of those benefits in this statement. Our practical experience with MLATs over the years has demonstrated that they are far more efficient than other formal means of international legal assistance, specifically including letters rogatory, as MLAT requests do not require a court order and they are not routed through diplomatic channels. MLATs establish a direct channel of communication between Central Authorities—usually contained within the respective treaty partners' Departments of Justice—and they confer a binding legal obligation to provide assistance if the requirements of the treaty are met. MLATs are broad in scope, and provide for assistance at the investigatory stage, usually without the requirement of dual criminality. These treaties pierce bank secrecy and provide a mechanism for addressing legal and policy issues

such as confidentiality, admissibility requirements for evidence, allocation of costs, confrontation of witnesses at foreign depositions and custodial transfer of witnesses. Significantly, MLATs provide a framework for cooperating in the tracing, seizure and forfeiture of criminally-derived assets.

Despite these and other benefits, we realize that MLATs in themselves are not the solution to all aspects of law enforcement cooperation. They are similar to extradition treaties in that their success depends on our ability to implement them effectively, combining comprehensive and updated legal provisions with the competence and political will of our treaty partners. Our recognition of the importance of effective treaty implementation led to the development of a consultation clause that we include in our MLATs, to ensure that we will have regular dialogues with our treaty partners on the handling of our cases.

While all the MLATs before the Committee share certain standard features, the specific provisions vary to some extent. The technical analyses and transmittal packages explain these variations, which are the result of negotiations over a period of years with a range of countries, each of which has a different legal system and each of which represents a different law enforcement priority for the United States. I would like to highlight how each of the MLATs before the Committee reflects our international law enforcement priorities:

- *Belize MLAT:* The MLAT will join the new extradition treaty with Belize to form the basis of a modern law enforcement relationship between our two countries. Both U.S. and Belizean negotiators viewed the MLAT as an instrument to enhance efforts to combat narcotics trafficking, which efforts will be carried out, in part, through assistance in freezing and seizing criminally-derived assets. In addition, as Belize is an off-shore financial jurisdiction, an exchange of diplomatic notes accompanies the treaty to memorialize the parties' intent to cover assistance in criminal tax matters.
- *India MLAT:* The MLAT with India will, similarly, join with a new extradition treaty to update and enhance our law enforcement relationship. We expect the MLAT to be of

particular assistance in investigating and prosecuting criminal matters relating to terrorism, narcotics trafficking, economic crimes and organized crime.

- *Ireland MLAT:* The Ireland MLAT will enhance our network of such treaties with member states of the European Union and will facilitate our requests to Ireland for assistance in a variety of cases, including those related to money laundering, transnational terrorism and organized crime.
- *Liechtenstein MLAT:* This treaty represents an important breakthrough in our ability to pierce bank secrecy laws in Liechtenstein, a major off-shore financial center, and is the first MLAT for Liechtenstein. Liechtenstein has agreed to provide assistance in investigations and prosecutions involving tax fraud offenses and, through an exchange of notes accompanying the treaty, conduct which is deemed tax evasion under U.S. law clearly will be covered.
- *Sweden MLAT:* This MLAT will facilitate our requests to Sweden—another European Union state—for assistance in a variety of criminal cases, including those related to terrorism, fraud, tax, computer crime, money laundering and homicide.

The hearing record also included questions and answers submitted for the record. The excerpts provided below address the Stolen Vehicle Treaty with Honduras, role of death penalty assurances, parental child abduction, Peruvian justice system and Swedish cooperation in child abduction cases.

From Senator Biden:

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Question. What is the current state of law enforcement cooperation, in general, with Honduras?

Answer. Our law enforcement cooperation relationship with Honduras is functional, and we hope it becomes more extensive in the future.

The extradition treaty between the United States and Honduras was signed in 1909, entered into force in 1912, and was modified by a supplementary convention of 1927. Although Honduras' recent record with respect to extradition under the treaty leaves room for improvement, the country has responded to U.S. requests by deporting fugitives to the United States where possible. We have as a long-term goal the negotiation of a modern extradition treaty with that country. Honduras does not have an MLAT relationship with the United States, but cooperates with U.S. law enforcement agencies on law enforcement matters in the absence of an MLAT. *Question.* What has been the experience to date under the stolen vehicle treaties which entered into force since the Senate approved several such treaties in 2000? Answer. In 2000, the Senate gave its advice and consent to ratification of five stolen vehicle treaties. Three of the five treaties have entered into force: the Dominican Republic treaty (entered into force August 3, 2001), the Panama treaty (entered into force September 13, 2001), and the Belize treaty (entered into force August 16, 2002). The Costa Rica and Guatemala treaties are in the final stages of approval and entry into force, and we hope to bring them into force soon.

The Belize treaty only came into force on August 16, and we have not yet had any experience under that treaty. We have begun making requests for the return of vehicles from Panama and Belize. We have thus far only made one request to Panama and are awaiting action on that request. Our Embassy in the Dominican Republic has made approximately 10 requests for the return of U.S. stolen vehicles. Dominican officials have already made six of these vehicles available for return, and the Embassy expects the remaining four vehicles to be available for return next month.

Question. Which of the countries concerned by these law enforcement treaties have concluded so-called Article 98 bilateral agreements with the United States to protect American officials and service members from surrender to the International Criminal Court? For those which have not, when will such agreements be concluded?

Answer. The United States and Honduras concluded an Article 98 agreement on September 19. We are continuing our efforts to conclude Article 98 Agreements with as many countries as possible, including with the countries concerned by these law enforcement treaties.

From Senator Helms

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Question. Have any of these countries (Belize, Canada, India, Ireland, Liechtenstein, and Sweden) ever declined officially or informally to provide law enforcement assistance of any kind to the United States in a terrorism case without assurance that the death penalty or life imprisonment would not be imposed?

Answer. No, none of these countries has refused for any reason to assist the United States in terrorism-related extradition or mutual assistance cases.

Question. Do any of the indicated treaties explicitly require that the requested law enforcement assistance be provided to the United States, without "assurances", in a terrorism case even if the death penalty or life imprisonment could be imposed?

Answer. Both the Lithuania and Peru extradition treaties, like most recent extradition treaties, allow requests for assurances that the death penalty will not be imposed or carried out. The United States agrees to include such a provision because in many countries, including Lithuania and Peru, the death penalty has been outlawed, and extradition to the United States in some extremely serious cases would, as a practical matter, be impossible unless there is a mechanism for assurances. The Second Protocol to the Canada extradition treaty does not address these kinds of issues. The existing extradition treaty with Canada, however, also allows for death penalty assurances, in cases where the offense involved is not punishable by death in the Requested State. Neither these extradition treaties nor the Canada extradition treaty contemplate the possibility of assurances that life imprisonment will not be imposed or carried out.

Unlike extradition treaties, U.S. mutual legal assistance treaties in general, including the five (Belize, India, Ireland, Liechtenstein

and Sweden) before the Senate, do not include death penalty assurance provisions. The issue of death penalty assurances has rarely arisen in this context, but a small number of countries recently have raised the potential of capital punishment for crimes as in connection with U.S. requests for legal assistance (whether the requests are made under treaty or as a matter of international comity and reciprocity). In these cases we have argued that the potential punishment in a U.S. proceeding should not be a factor in whether assistance should be granted.

The issue of U.S. life imprisonment provisions has not arisen to our knowledge in the mutual assistance context.

From Senator Boxer:

Question. Does the dual criminality provision in the treaties before us today ensure that child abduction is a covered crime? Is the U.S. making an effort to update aged extradition treaties with those nations where child abduction problems are most common?

Answer. We expect that parental child abduction will be an extraditable offense under these two new treaties. Extradition is required under the new treaties with Lithuania and Peru if the offense is punishable by a period of more than one year or by a more severe penalty. (Lithuania Treaty, Art. 2(1); Peru Treaty, Art. II(1)). Parental child abduction is punishable in the United States by a period of more than one year. Because we understand that the conduct constituting parental child abduction is also punishable in both Lithuania and Peru by more than one year, we expect it will be an extraditable offense under both of these treaties. With respect to other U.S. extradition treaties, all of the U.S. Government's extradition treaties agreed upon since 1980 are dual criminality treaties similar to the Lithuania and Peru treaties. Parental child abduction is thus an extraditable offense under these treaties if our treaty partner has also criminalized the conduct. While many countries still treat parental child abduction solely as a civil and family law matter, an increasing number are providing for serious criminal penalties. As noted in the question, our older extradition treaties (generally those signed before 1980) are most typically "list" treaties that did not include "parental child abduction" or "parental kidnapping" or a similar phrase or concept

among the list of extraditable offenses. This is because at the time the treaties were negotiated parental child abduction was not a criminal offense, including in the United States. Normally, the interpretation of "list" treaties would simply evolve to reflect the evolution of new aspects of crimes that are identified in the list treaties. In this instance, however, the U.S. view that extradition list treaties did not include parental child abduction had been widely disseminated, including by publication in the Federal Register of the United States in 1976.

To remedy this situation, the State and Justice Departments brought this issue to the attention of Congress in 1997. These consultations led to Public Law 105–323 (The Extradition Treaties Interpretation Act of 1998), which addresses the matter by clarifying that "kidnapping" in extradition list treaties may include parental kidnapping, thus reflecting the major changes that have occurred in this area of criminal law in the last 20 years. With this clarification, the Executive Branch is now in a position to make and act upon the full range of possible extradition requests dealing with parental kidnapping under list treaties that include the word "kidnapping" on such lists. This will help achieve the goal of enhancing international law enforcement in this area. The United States would, however, adopt this broader interpretation only once it has confirmed with respect to a given treaty that this would be a shared understanding of the parties regarding the interpretation of the treaty in question. In this respect, as other countries criminalize parental child abduction, we will have an increasing number of extradition treaty relationships that cover this offense.

After Public Law 105–323 was enacted, this change in the U.S. practice of interpreting extradition list treaties was announced in the Federal Register on January 25, 1999 (Vol. 64, No. 15, pages 3735–36). As Senator Boxer's question reflects, however, the relevant passage discussing extradition list treaties in the State Department's web site and in the State Department's brochure on parental child abduction similarly needs to be updated to reflect this change in practice. We will change the relevant sentences in the web site and in future editions of the print version of the brochure. We appreciate the Committee's bringing this issue to our attention.

Question. If confidence among the Peruvian public in the judiciary is low, why should the United States have confidence that a suspect extradited by the United States to Peru will receive a fair trial? Doesn't Peru's appeal of the Commission's decision to the Inter-American Court show an unwillingness to acknowledge problems with its judicial system?

Answer. Since the downfall of the Fujimori government in November 2000, Peru has made many strides to correct deficiencies in its judicial system. At the end of 2000, Peru abolished the executive committees through which former president Fujimori had exercised control over the judiciary, restored the powers of the National Magistrates Council (CNM) to evaluate judges and prosecutors, and created transitory councils to remove corrupt judges. In late 2000, the Peruvian government established a new Pardons Commission to examine the cases of persons imprisoned for terrorism under the Fujimori government. As of October 2001, 90 persons had been released from prison. Along with over 600 persons pardoned between 1996 and 2000, a total of over 700 persons were pardoned and released after being accused unjustly of terrorism. In August 2001, President Toledo nearly doubled the salaries of tenured judges and prosecutors to make working in the judiciary more attractive and to reduce corruption incentives. Thus, while much work remains to be done, Peru is taking active steps to reform its judicial system.

Under U.S. extradition law and practice, once a fugitive has been found extraditable by a U.S. court, the Secretary of State (or Deputy Secretary) must review the case and issue a surrender warrant before that person could be extradited to Peru or any other country with which we have an extradition treaty. As part of that review and decision-making process, the Secretary takes into account any information available that may affect the defendant's ability to receive a fair trial.

With respect to the case of Lori Berenson, Peru's Supreme Court in 2001, in an unprecedented action, nullified Ms. Berenson's original conviction by a military court and ordered a civilian re-trial. During her civilian trial, Ms. Berenson was allowed to confront the witnesses against her and present evidence in her defense.

The civilian court found Ms. Berenson guilty of terrorist collaboration. She appealed her sentence, which was upheld by the Peruvian Supreme Court. The case is now in the Inter-American Human Rights system. The Inter-American Commission on Human Rights, based here in Washington, issued non-binding recommendations finding Ms. Berenson had not received due process. As a party to the American Convention on Human Rights, Peru exercised its right under Article 51 to ask the Inter-American Court of Human Rights, in San Jose, Costa Rica, to review the case. The decisions of the Court are legally binding, and we have every expectation that Peru will comply with whatever decision the Court renders.

Meanwhile, U.S. consular officials continue to monitor the situation closely and visit Ms. Berenson regularly. They will continue to make every effort to ensure that the Government of Peru provides her with humane living conditions and appropriate medical care while she is in confinement.

Question. On October 2, 2001 Mexico's Supreme Court of Justice ruled that in order for any extradition to proceed, the Requesting State must provide assurances that life imprisonment will not be imposed. The ruling has the potential to impact all extradition cases between the U.S. and Mexico-and this severely impacts California. Is this a problem that is limited to just Mexico or the beginning of a larger trend?

Answer. A worldwide trend does not appear to exist with respect to seeking life imprisonment assurances. In addition to Mexico, a handful of other countries have raised life imprisonment assurances issues (e.g., Colombia, where extradition takes place under its national extradition law), but as to those other countries, there has not been a significant adverse effect on our ability to extradite fugitives. This is not the case with Mexico, where we have experienced a severe impact on our ability to secure the surrender of our most serious criminal offenders.

The Department of Justice has corresponded with Los Angeles District Attorney Steve Cooley concerning his Mexican extradition cases, as well. We continue to work closely with D.A. Cooley's office, as well as with federal and state prosecutors throughout

the country, in an attempt to provide Mexico with assurances that are consistent with U.S. law and serve the ends of justice. In addition, we continue to raise the assurances issue with the Government of Mexico. In fact, Secretary Powell explicitly raised the issue in his meeting on September 30, 2002 with Mexican Foreign Minister Jorge Castaneda. We will also raise the issue again at a meeting of senior U.S. and Mexican law enforcement officials at the end of October.

* * * *

Question. Why should the United States enter into an MLAT relationship with Sweden when it is not living up to its commitments under other treaties?

Answer. The United States should enter into this MLAT relationship because it is in the United States' interest to do so. Moreover, Sweden is in fact generally living up to its commitments under other treaties.

It is the Administration's position that the MLAT is a valuable law enforcement tool, and that it should be approved on its merits as such. The experience of this last year has only underscored the international character of the crimes most threatening to our citizens, and thus, our responsibility to provide U.S. prosecutors and investigators the means to secure evidence from abroad.

The proposed MLAT with Sweden will enhance bilateral cooperation in law enforcement matters. The Administration plans to use this treaty to obtain assistance in connection with our efforts to fight terrorism, narcotics trafficking, organized crime, violent crime, money laundering, and terrorist financing and other crimes where Sweden has evidence that could assist us in our criminal investigations and prosecutions.

The United States and Sweden already cooperate on a broad range of law enforcement issues, and we have received assistance from Sweden on judicial assistance requests on a case-by-case basis. However, formal requests may require the burdensome and time-consuming process of letters rogatory, and there is no binding obligation on Sweden's part to assist the United States. The proposed MLAT will require Sweden to provide us assistance and

only permits Sweden to decline to assist us in very specific instances. The treaty also designates a central authority to facilitate action under such requests, thereby improving the ability of both countries to obtain the necessary judicial assistance to prosecute and investigate crimes.

Moreover, although no relationship with any country is without its disagreements, we consider Sweden a good treaty partner that generally complies with its treaty obligations. In fact, the United States and Sweden have many bilateral treaties and agreements in force. According to the January 1, 2002 Treaties in Force, we currently have in force over 45 bilateral treaties or agreements with Sweden on a wide variety of topics including with respect to atomic energy, aviation, customs, defense, environmental cooperation, scientific cooperation, social security, space cooperation and taxation—the most recent agreement being a defense agreement that entered into force on December 20, 1999, and the earliest an agreement with respect to mapping entered into force on April 1, 1885.

In the area of law enforcement in particular, Sweden has a proven track record in cooperating with us in connection with our existing law enforcement treaty—the Extradition Treaty between the United States and Sweden—has been in force since 1963. In the last two years, Sweden has extradited three defendants to the United States (one wanted for rape, one for fraud, and the other for narcotics offenses). All were provisionally arrested promptly at our request. In the same period, we have extradited two fugitives to Sweden (one was an accused murderer, the other was wanted for parental child kidnapping and requested that she be extradited after she was arrested). We have provisionally arrested another fugitive from Sweden for serious narcotics offenses.

To the extent the question is directed at Sweden's compliance under the Hague Convention, the problem of international parental child abduction, and of compliance with the Hague Convention by treaty partners including Sweden, are matters of serious concern to the State and Justice Departments.

Assisting the victims of international parental child abduction has long been a priority for the Department of State and is an

important activity of State's Bureau of Consular Affairs. In 1994, the Bureau created the Office of Children's Issues. The Abduction Unit of this office now employs 17 officers and staff devoted exclusively to working with parents to resolve the cases of their abducted children. The Office currently handles approximately 1,100 international parental child abduction cases yearly, including abductions to and from the United States. We have active child abduction cases in many countries and in every region of the world.

We have designated a specific point of contact at each of our Embassies and Consulates worldwide to facilitate our work on abduction cases. Additionally, in 1998 the Secretary of State and Attorney General established an inter-agency policy group to improve the federal response to this issue. This policy group created a specific action plan and established an inter-agency working group, chaired by the Director of the Office of Children's Issues to implement this plan.

In connection with Sweden in particular, as discussed more fully in our response to the September 16 questions, while certain long-standing cases remain troubling, we believe Sweden's record under the Hague Convention—a convention governing the civil aspects of international parental abduction—has been steadily improving. The positive trend has been noted in our compliance reports to Congress and has been reinforced by recent experience involving Sweden. Notwithstanding these encouraging developments, we will continue to seek further improvement with Sweden, as with other countries, because compliance with the Hague Convention is a serious matter in its own right. However, these concerns need not and should not be linked to questions relating to the MLAT. The MLAT is a law enforcement tool. The wisdom of the Foreign Relations Committee in approving dozens of similar MLATs over the years has been well illustrated by the numerous cases—now including investigations related to the attacks of September 11th—in which the Department of Justice has been able to use MLATs to obtain evidence critical to the investigation and prosecution of serious crimes against the United States and its citizens. Accordingly, we urge the Committee to recommend advice and consent to ratification of the MLAT with Sweden.

2. Other Rendition

On August 15, 2002, the U.S. Court of Appeals for the Fourth Circuit dismissed an appeal by Mir Aimal Kasi from denial of a writ of habeas corpus by the U.S. District Court for the Eastern District of Virginia. *Kasi v. Angelone*, 300 F.3d 487 (4th Cir. 2002). In that case, Kasi had been convicted in a Virginia state court of capital murder, murder, malicious wounding, and related firearm charges arising out of the slaying of two Central Intelligence Agency employees and the wounding of three others on January 25, 1993. He was sentenced to death. The Virginia Supreme Court upheld the convictions and denied his petition for habeas relief. *Kasi v. Commonwealth*, 508 S.E.2d 57 (Va. 1998). The U.S. Supreme Court denied his petition for writ of certiorari from both decisions of the Virginia Supreme Court. *Kasi v. Virginia*, 527 U.S. 1038 (1999) and *Kasi v. Angelone*, 531 U.S. 894 (2000).

In his effort to appeal the denial of habeas relief, Kasi argued, among other things, that the state trial court lacked personal jurisdiction over him because he was illegally abducted and forcibly removed from his home country of Pakistan by FBI agents in violation of a 1931 extradition treaty between the United States and the United Kingdom, which the parties agreed was in force between the United States and Pakistan. Excerpts below from the decision of the court of appeals explain the basis for its dismissal of his appeal.

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* * * *

. . . [A]lthough the terms of an extradition treaty might limit a court's ability to prosecute a defendant who has been returned to the United States by virtue of the treaty in certain circumstances, the Court has plainly held that an extradition treaty does not divest courts of jurisdiction over a defendant who has been abducted from another country where the terms of the extradition treaty do not prohibit such forcible abduction. *See* Alvarez-Machain, 504 U.S. at 670. . . .

* * * *

. . . Kasi now contends that Alvarez-Machain does not control because, unlike in that case, the United States government had initiated extradition proceedings with the Pakistani government pursuant to the treaty. Once the extradition process was initiated by the United States under the Extradition Treaty, Kasi argues, the United States was prohibited from ignoring that process in favor of forcible abduction. And, according to Kasi, the government was required to complete the formal extradition process set forth in the treaty with the Pakistani government.

* * * *

The evidence Kasi seeks to rely upon in his federal habeas claim demonstrates, at most, that the United States issued a formal extradition request to the Pakistani government in April 1993, immediately after the crimes were committed and Kasi was indicted. However, it remains undisputed that nothing happened pursuant to the extradition process. Kasi's seizure in Pakistan and his return to the United States in 1997—four years after the supposed request was issued—was not accomplished pursuant to an extradition request or otherwise pursuant to the Extradition Treaty relied upon by Kasi to challenge jurisdiction. Rather, Kasi was located and abducted by FBI agents operating in Pakistan, an act that was not prohibited by the Extradition Treaty and that did not divest the Virginia state court of jurisdiction to try Kasi for the offenses committed in Virginia.

* * * *

Having considered Kasi's jurisdictional challenge, with and without the new evidence sought to be introduced, we are confident that the Virginia Supreme Court's rejection of Kasi's jurisdictional challenge was not contrary to nor an unreasonable application of relevant Supreme Court precedents. Kasi was forcibly abducted by United States officials and returned to this country, perhaps with the acquiescence of the Pakistani government or other Pakistani citizens, but not in violation of the terms of the Extradition Treaty between the two countries. Accordingly, Kasi is not entitled to federal habeas relief on this basis.

* * * *

3. Other Mutual Legal Assistance Issues

a. U.S.-Russia

On January 31, 2002, Secretary of State Colin Powell and Russian Ambassador to the United States Yuriy Ushakov signed the Protocol on Exchange of Instruments of Ratification to bring into force a mutual legal assistance treaty between the United States and Russia. It replaced the U.S.-Russia Mutual Legal Assistance Agreement, signed in 1995. *See www.state.gov/r/pa/prs/ps/2002/7734.htm.*

b. American Institute in Taiwan-Taipei Economic and Cultural Representative Office in the United States

On March 22, 2002, the American Institute in Taiwan ("AIT") and the Taipei Economic and Cultural Representative Office in the United States ("TECRO") signed an Agreement on Mutual Legal Assistance in Criminal Matters. Under the Taiwan Relations Act (P.L.96–8, 93 Stat. 14, 22 U.S.C. 3301 *et seq*), transactions carried out by any agency of the U.S. Government with respect to Taiwan are carried out through AIT, a nonprofit corporation incorporated under the laws of the District of Columbia. TECRO is the unofficial instrumentality established by the people on Taiwan to take actions on behalf of Taiwan in accordance with the Taiwan Relations Act.

As specified in Article 1(3), AIT and TECRO are the Parties to the agreement. Article 2(1) of the mutual legal assistance agreement provides that

> The Parties shall provide mutual assistance *through the relevant authorities of the territories they represent*, in accordance with the provisions of this Agreement, in connection with the investigation, prosecution, and prevention of offenses, and in proceedings related to criminal matters. (emphasis added.)

c. U.S.-Europol

On December 6, 2001, the United States and the European Police Office ("Europol") entered into an agreement creating an overall institutional framework for cooperation between U.S. law enforcement authorities and Europol. 2001 U.S.T. LEXIS 67. Europol is an organization created by the European Union to assist member states' police forces in combating trans-border serious crime. The 2001 agreement regulated the exchange of technical and strategic information but did not authorize the transmission of data relating to particular persons. The exchange of personal data was reserved for further examination and possible inclusion in a supplemental agreement. *See Digest 2001* at 936. During 2001 the European Council of Ministers had expanded Europol's mandate substantially to include additional serious crimes including kidnapping, hostage-taking, computer crime, and arms trafficking.

On December 20, 2002, the United States and Europol signed the Supplemental Agreement on the Exchange of Personal Data and Related Information. Key provisions of the agreement are set forth below. *See* chapter 10.A.1.b. for a letter responding to questions from Europol concerning the extent to which it could be held liable for damages in U.S. courts based on its transmission of information to the United States under the agreement.

The full texts of the documents excerpted in this section are available at *www.state.gov/s/l/c8183.htm*.

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* * * *

Article 1
Purpose

The purpose of this agreement is to enhance the cooperation of the Member States of the European Union, acting through

Europol, and the United States of America, in preventing, detecting, suppressing, and investigating criminal offenses within the respective jurisdiction of the Parties, in particular by facilitating the reciprocal exchange of information, including personal data.

Article 2
Definitions

For purposes of this Agreement:

(a) "personal data" means any information relating to an identified or identifiable natural person;
(b) "identifiable natural person" means a natural person who can be identified, directly or indirectly, by reference to, in particular, an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;
(c) "processing of personal data" means any operation or set of operations which is performed upon such data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, combination, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.

* * * *

Article 4
Communications between the Parties

* * * *

4. A Party may, without prior request, forward to the other Party information when it considers that disclosure of such information might assist the receiving Party. A brief statement of the reasons for forwarding the information shall be provided to the extent feasible and necessary, or to the extent required by the applicable legal framework of the forwarding Party.

Article 5
General terms and conditions

1. (a) Transmission of information under this agreement to, and its further processing by, the receiving Party shall be for the purposes set forth in the request, which shall be deemed to include the prevention, detection, suppression, investigation and prosecution of any specific criminal offenses, and any specific analytical purposes, to which such information relates. Where the receiving Party seeks the use of such information for other purposes, it shall ask for the prior consent of the Party that furnished the information.
   (b) Notwithstanding subparagraph (a), nothing in this Agreement shall prevent the receiving Party from:
      (i) disclosing in its proceedings, information or evidence that tends to exculpate an accused person. In this situation, the receiving Party shall notify the transmitting Party in advance of disclosure, or, in an exceptional case in which advance notice is not possible, without delay thereafter.
      (ii) using without restriction information or evidence that has been made public as a normal result of having been provided.

* * * *

Article 6
Transmission of special categories of personal data

Personal data revealing race, political opinions, or religious or other beliefs, or concerning health and sexual life, may be provided only upon the transmitting Party's determination that such data is particularly relevant to a purpose set forth in Article 5, paragraph 1.

* * * *

Article 7
Authorities competent to receive information

1. (a) Information supplied by Europol under this Agreement shall be available to competent U.S. federal authorities for use in accordance with this Agreement.
   (b) Such information shall also be available for use by competent U.S. state or local authorities provided that they agree to observe the provisions of this Agreement, in particular Article 5, paragraph 1.
2. Europol shall ensure that information supplied by the United States under this Agreement will only be made available to the competent law enforcement authorities of the Member States of the European Union or for use within Europol.
3. Onward transmission of information to international institutions, or to third States, will only take place with the prior written consent of the Party that supplied the information, unless already in the public domain.

* * * *

An exchange of letters dated December 20, 2002, between Mark M. Richard, Counselor for Criminal Matters, United States Mission to the European Union, and Willy Bruggeman, Deputy Director, European Police Office, set forth agreed amplifications on certain points, excerpted below.

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* * * *

4. Article 4

With respect to paragraph 4 the United States takes note that under Europol's legal framework, it may only forward without prior request personal data under the Supplemental Agreement where it is necessary in individual cases for the prevention or combating of criminal offences for which Europol is competent. In the event that Europol shall find itself unable to directly forward such information to the United States it shall endeavour to obtain the

consent of a Member State to transmit the information to U.S. authorities itself.

5. Article 5

The Parties agree that the phrase "prevention, detection, suppression, investigation and prosecution of any specific criminal offences and for any analytical purposes to which such information relates" as used in Article 5, paragraph 1 *sub* (a), includes, *inter alia*, exchange of information pertaining to immigration investigations and proceedings, and to those relating to *in rem* or *in personam* seizure or restraint and confiscation of assets that finance terrorism or form the instrumentalities or proceeds of crime, even where such seizure, restraint or confiscation is not based on a criminal conviction.

The United States takes note of the fact that under its legal framework, Europol may not presently authorise usage for other purposes than those included in paragraph 1.

The United States also takes note of the fact that under its legal framework, Europol may not presently transmit to the United States data that were transmitted to it by a Member State under this agreement without that Member State's prior consent.

Article 5, paragraph 4, of the Supplemental Agreement is to be understood not to permit the imposition of generic restrictions with respect to the sharing of personal data, additional to the express requirements of the Agreement, as a precondition to be imposed by either Europol or one of its Member States.

* * * *

7. Article 7

With respect to paragraph 1, Parties note that "competent authorities" shall mean those authorities who are responsible for functions relating to the prevention, detection, suppression, investigation and prosecution of criminal offences.

With respect to paragraph 3, the United States takes note of the fact that under its legal framework Europol is not allowed to provide authorisation for onward transmission beyond that reflected in this Agreement; conversely this Agreement shall not be

relied upon as authority for Europol or its Member States to cause the onward transmission of data supplied by the U.S. except as authorised by this Agreement.

* * * *

B. INTERNATIONAL CRIMES

1. Terrorism

a. Foreign Terrorist Organizations

(1) Legal criteria for designations

On October 23, 2002, the Office of Counterterrorism, U.S. Department of State, issued a fact sheet explaining the legal criteria and process for designation of entities as foreign terrorist organizations under section 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189. The fact sheet is set forth below. See also *Digest 2001* at 918.

Foreign Terrorist Organizations are foreign organizations that are designated by the Secretary of State in accordance with section 219 of the Immigration and Nationality Act (INA), as amended. FTO designations play a critical role in our fight against terrorism and are an effective means of curtailing support for terrorist activities and pressuring groups to get out of the terrorism business.

Identification

The Office of the Coordinator for Counterterrorism in the State Department (S/CT) continually monitors the activities of terrorist groups active around the world to identify potential targets for designation. When reviewing potential targets, S/CT looks not only at the actual terrorist attacks that a group has carried out, but also at whether the group has engaged in planning and preparations for possible future acts of terrorism or retains the capability and intent to carry out such acts.

Designation

Once a target is identified, S/CT prepares a detailed "administrative record," which is a compilation of information, typically including both classified and open sources information, demonstrating that the statutory criteria for designation have been satisfied. If the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, decides to make the designation, Congress is notified of the Secretary's intent to designate the organization and given seven days to review the designation, as the INA requires. Upon the expiration of the seven-day waiting period, notice of the designation is published in the *Federal Register*, at which point the designation takes effect. An organization designated as an FTO may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit not later than 30 days after the designation is published in the *Federal Register*.

FTO designations expire automatically after two years, but the Secretary of State may redesignate an organization for additional two-year period(s), upon a finding that the statutory criteria continue to be met. The procedural requirements for designating an organization as an FTO also apply to any redesignation of that organization. The Secretary of State may revoke a designation or redesignation at any time upon a finding that the circumstances that were the basis for the designation or redesignation have changed in such a manner as to warrant revocation, or that the national security of the United States warrants a revocation. The same procedural requirements apply to revocations made by the Secretary of State as apply to designations or redesignations. A designation may also be revoked by an Act of Congress, or set aside by a Court order.

Legal Criteria for Designation (Reflecting Amendments to Section 219 of the INA in the USA PATRIOT Act of 2001)

1. It must be a *foreign organization*.
2. The organization must *engage in terrorist activity*, as defined in section 212 (a)(3)(B) of the INA (8 U.S.C.

§ 1182(a)(3)(B)),* or *terrorism*, as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal

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* Section 212(a)(3)(B) of the INA defines "terrorist activity" to mean: "any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing."

Other pertinent portions of section 212(a)(3)(B) are set forth below:

(iv) Engage in Terrorist Activity Defined

As used in this chapter [chapter 8 of the INA], the term "engage in terrorist activity" means in an individual capacity or as a member of an organization—to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

1. to prepare or plan a terrorist activity;
2. to gather information on potential targets for terrorist activity;
3. to solicit funds or other things of value for—(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity;

II. to solicit any individual—

(aa) to engage in conduce otherwise described in this clause;

(bb) for membership in terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know,

Years 1988 and 1989 (22 U.S.C. § 2656f(d)(2)),** *or retain the capability and intent to engage in terrorist activity or terrorism.*

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and should not reasonably have known, that the solicitation would further the organization's terrorist activity; or

III. to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—
   (aa) for the commission of a terrorist activity;
   (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;
   (cc) to a terrorist organization described in clause (vi)(I) or (vi)(II); or
   (dd) to a terrorist organization described in clause (vi)(III), unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity.

This clause shall not apply to any material support the alien afforded to an organization or individual that has committed terrorist activity, if the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, concludes in his sole unreviewable discretion, that that this clause should not apply."

"(v) Representative Defined

As used in this paragraph, the term 'representative' includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

i. Terrorist Organization Defined

As used in clause (i)(VI) and clause (iv), the term 'terrorist organization' means an organization—

I. designated under section 219 [8 U.S.C. § 1189];

II. otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General, as a terrorist organization, after finding that the organization engages in the activities described in subclause (I), (II), or (III) of clause (iv), or that the organization provides material support to further terrorist activity; or

III. that is a group of two or more individuals, whether organized or not, which engages in the activities described in subclause (I), (II), or (III) of clause (iv).

** Section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 defines "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."

3. The organization's terrorist activity or terrorism must threaten the security of U.S. nationals *or* the national security (national defense, foreign relations, *or* the economic interests) of the United States.

Legal Ramifications of Designation

1. It is unlawful for a person in the United States or subject to the jurisdiction of the United States to knowingly provide "material support or resources" to a designated FTO. (The term "material support or resources" is defined in 18 U.S.C. § 2339A(b) as "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.")
2. Representatives and members of a designated FTO, if they are aliens, are inadmissible to and, in certain circumstances, removable from the United States (see 8 U.S.C. §§ 1182 (a)(3)(B)(i)(IV)–(V), 1227 (a)(1)(A)).
3. Any U.S. financial institution that becomes aware that it has possession of or control over funds in which a designated FTO or its agent has an interest must retain possession of or control over the funds and report the funds to the Office of Foreign Assets Control of the U.S. Department of the Treasury.

Other Effects of Designation

1. Supports our efforts to curb terrorism financing and to encourage other nations to do the same.
2. Stigmatizes and isolates designated terrorist organizations internationally.
3. Deters donations or contributions to and economic transactions with named organizations.

4. Heightens public awareness and knowledge of terrorist organizations.
5. Signals to other governments our concern about named organizations.

Background

- In October 1997, then-Secretary of State Madeleine K. Albright approved the designation of the first 30 groups as FTOs.
- In October 1999, Secretary Albright redesignated 27 of these groups as FTOs but determined that three organizations should not be redesignated.
- Secretary Albright designated one additional FTO in 1999 (al-Qa'ida) and another in 2000 (Islamic Movement of Uzbekistan).
- Secretary of State Colin L. Powell designated two additional FTOs (Real IRA and United Self-Defense Forces of Colombia) in 2001.
- In October 2001, Secretary Powell redesignated 25 of the 28 FTOs whose designations were due to expire, combining two previously designated groups (Kahane Chai and Kach) into one.
- Secretary Powell has designated five additional FTOs (Al-Aqsa Martyrs Brigade, Asbat al-Ansar, Jaish-e-Mohammed, Lashkar-e Tayyiba and Salafist Group for Call and Combat) between October 2001 and July 2002.

[Editor's note: the following actions were also taken in 2002: two new entities, the Communist Party of the Philippines/New People's Army (CPP/NPA) and Jemaah Islamiya Organization (JI), were designated, 67 Fed. Reg. 53,379 (Aug. 15, 2002) and 67 Fed. Reg. 65,168 (Oct. 23, 2002); the Islamic Movement of Uzbekistan (IMU) was redesignated, 67 Fed. Reg. 60, 27 (Sept. 25, 2002) and the alias Kurdistan Freedom and Democracy Congress (KADEK) was added to the Kurdistan Workers' Party (PKK) designation. 67 Fed. Reg. 72, 017 (Dec. 3, 2002).]

(2) Litigation by designated FTOs

On June 14, 2002, the U.S. Court of Appeals for the District of Columbia Circuit denied a petition for judicial review of the designation of three Irish political organizations pursuant to 8 U.S.C. § 1189: the 32 County Sovereignty Committee and its successor entity, the 32 County Sovereignty Movement, and the Irish Republican Prisoners Welfare Association. *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797 (D.C. Cir. 2002). In its opinion the court referred to *Nat'l Council of Resistance of Iran ("NCRI") v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001) and *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999). *Nat'l Council of Resistance of Iran*, discussed in *Digest 2001* at 109–117, held that the groups in that case were entitled to limited due process rights in the designation process because the NCRI (which was designated as an alias of the People's Mojahedin of Iran ("MEK")) maintained an office in Washington, D.C., and had certain additional contacts with the United States.* The court of appeals in *32 County Sovereignty Committee* found contacts with the United States in that case to be insufficient to support a claim of constitutional due process protections, and rejected claims based on the fact that the designation

* The court of appeals in that case did not vacate the existing designations but remanded the matter to the Secretary of State for reconsideration after further administrative procedures. On remand, the Secretary provided the MEK with an opportunity to respond to the unclassified evidence in the record against it, as directed by the court. On September 24, 2001, the Department of State notified the MEK that the Secretary had decided not to vacate its 1999 designation as a foreign terrorist organization. In addition, on October 5, 2001, the Secretary redesignated the MEK, based on a new record compiled in 2001. 66 Fed. Reg. 51,088 (2001). The MEK has challenged the determinations in the D.C. Circuit, and the case was pending at the end of 2002. *People's Mojahedin Organization of Iran v. Dep't of State*, No. 01-1465 (D.C. Cir.). As of December 31, 2002, the Secretary was still considering administratively whether to leave in place the 1999 designation and the 2001 redesignation of the NCRI as an MEK alias. The NCRI has also challenged its 2001 designation in the D.C. Circuit, but that case is stayed pending the Secretary's final administrative decision.

was supported largely by information received from foreign countries. Excerpts from the decision are set forth below.

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Turning to the merits, we think it clear that People's Mojahedin, rather than National Council, governs this case. In People's Mojahedin we held that "[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." 182 F.3d at 22. 32 County and the Association have demonstrated neither a property interest nor a presence in this country. They cannot "rightly lay claim to having come within the United States and developed substantial connections with this country." National Council, 251 F.3d at 202. Even the unclassified record in National Council revealed that the designated organizations had "an overt presence within the National Press Building . . . and . . . claim[ed] an interest in a small bank account." Id. at 201. In contrast, the affidavits petitioners submitted in this case demonstrate only that some of their American "members" personally rented post office boxes and utilized a bank account to transmit funds and information to 32 County and the Association in Ireland. The affidavits do not aver that either organization possessed any controlling interest in property located within the United States, nor do they demonstrate any other form of presence here. The Secretary therefore did not have to provide 32 County or the Association with any particular process before designating them as foreign terrorist organizations.

With respect to the substance of the Secretary's action against petitioners, the administrative record (including the classified information relied upon by the Secretary) furnishes substantial support for the Secretary's designation of 32 County and the Association as foreign terrorist organizations. We are satisfied that "the Secretary, on the face of things, had enough information before [him] to come to the conclusion that [32 County and the Association] were foreign and engaged in terrorism." People's Mojahedin, 182 F.3d at 25; see National Council, 251 F.3d at 198–99. The petition for judicial review is therefore denied.

* * * *

(3) Constitutionality of application in criminal law

On June 21, 2002, the U.S. District Court for the Central District of California found the statute providing for designation of Foreign Terrorist Organizations, 8 U.S.C. § 1189, unconstitutional on its face in the context of a criminal indictment based on the designation. *U.S. v. Rahmani*, 209 F. Supp. 2d 1045 (C.D.Cal. 2002). Defendants in this case had been indicted for violation of 18 U.S.C. § 2339B(a)(1), which prohibits persons within the United States or subject to its jurisdiction from "knowingly" providing "material support or resources" to any designated foreign terrorist organization. The district court dismissed the indictment against them, holding that the designation statute violated due process.

The foreign terrorist organization at issue in the case was the MEK, discussed *supra* in (2). The district court ruled more broadly, however, finding that the designation statute was unconstitutional on its face. It held that "designation pursuant to Section 1189 is a nullity since it is the product of an unconstitutional statute. When a statute is found to be violative of the Constitution, any action taken thereunder, i.e., a designation of a status authorized by such statute, must likewise fail. . . . Defendants have a vested legal right not to be deprived of liberty or property without due process of law." 209 F. Supp. 2d at 1058–1059. It should be noted that, despite this broad rationale, the decision applied only to the indictment before the district court and did not vacate or otherwise invalidate any designations or the criminal prohibition on providing material support. Nor did the court's decision constitute binding precedent in future cases. At the end of 2002 an appeal to the U.S. Court of Appeals for the Ninth Circuit was pending.

The constitutionality of 18 U.S.C. § 2339B itself had been generally upheld by the U.S. Court of Appeals for the Ninth Circuit. *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001). In that case, the district court had denied a preliminary injunction sought

on broad constitutional grounds, except that it did preliminarily enjoin two provisions of the statute as unconstitutionally vague—those concerning provision of "training" and "personnel" to foreign terrorist groups. 9 F. Supp. 2d 1176, 1205 (C.D. Ca. 1998). The court of appeals affirmed the district court's decision, finding the statutory provision constitutional, with the possible exception of the terms "personnel" and "training." The Ninth Circuit also addressed 18 U.S.C. § 1189 in that case. It held that the statute "does not grant the Secretary unfettered discretion in designating the groups to which giving material support is prohibited," because the Secretary must have reasonable grounds to believe that the organization engaged in terrorist acts before it can be designated. The court noted that, "because the regulation involves the conduct of foreign affairs, we owe the executive branch even more latitude than in the domestic context." 205 F.3d at 1137. On remand, the district court ruled that the terms "personnel" and "training" were unconstitutionally vague and issued a permanent injunction as to that aspect of the statute, while upholding the remainder of the prohibition. 2001 U.S. Dist. LEXIS 16729 (C.D. Cal. 2001). At the end of 2002 *Humanitarian Law Project* was on appeal for the second time. *See also U.S. v. Lindh*, 212 F. Supp. 2d 541 (E.D.Va. 2002), denying dismissal of counts based on 2339B against John Walker Lindh, for conspiracy to provide and providing material support and resources to al Qaeda in Afghanistan.

b. Asset freezing under IEEPA and Executive Order 13224

(1) Applicability to entity chartered within the United States

On December 31, 2002, the U.S. Court of Appeals for the Seventh Circuit affirmed the denial of a preliminary injunction against application of Executive Order 13224 to freeze assets of Global Relief Foundation, Inc. ("GRF") and block its designation as a Specially Designated Global Terrorist. *Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002). The court of appeals remanded the case to the district court

for consideration of whether the agency record supported GRF's designation.

Executive Order 13224 was issued by President George W. Bush on September 23, 2001, pursuant to authorities including the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq. ("IEEPA"). 66 Fed. Reg. 49,079 (Sept. 25, 2001). Section 1(d)(i) of the order blocked the assets of groups that "assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of" certain acts of terrorism, as determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General. Groups officially designated under this provision were to be referred to as Specially Designated Global Terrorists. *See Digest 2001* at 881–893.

As described by the court of appeals, GRF is an "Illinois charitable corporation that conducts operations in approximately 25 foreign entities, including Afghanistan, Albania, Bosnia, Kosovo, Iraq, Lebanon, Pakistan, Palestine (West Bank and Gaza), Russia (Chechnya and Ingushetia), Somalia, and Syria." Its assets were provisionally blocked under section 1702 of IEEPA on December 14, 2001. The relevant subsection provides that the Secretary of Treasury (as delegated by the President in E.O. 13224) may

> investigate, *block during the pendency of an investigation*, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, *any property in which any foreign country or a national thereof has any interest* by any person, or with respect to any property, subject to the jurisdiction of the United States [emphasis added].

50 U.S.C. § 1702(a)(1)(B).

While the suit was pending, on October 18, 2002, the Secretary of the Treasury designated GRF as a Specially

Designated Global Terrorist under E.O. 13224. As the court of appeals explained: "Designation did not change the status of GRF's assets and records, which remain in Treasury's control. But it does affect the scope of arguments available on appeal. . . . To the extent that GRF was attacking the factual support for the interim order, time has passed that issue by; the right question now is whether the designation of October 18 is supported by adequate information, and that question cannot be resolved until the district court has assembled a new record. . . ."

The court of appeals rejected GRF's contention that the IEEPA did not apply to corporations that hold charters issued within the United States. GRF argued that it was a U.S. corporation and thus all property, including bank accounts, was owned by a U.S. corporation and could not be "property in which any foreign country or a national thereof has any interest" for the purpose of § 1702(a)(1)(B). The court also rejected GRF's constitutional arguments, including challenges based on separation of powers, use of classified evidence considered ex parte by the district court, characterization of IEEPA as an ex post facto law, and entitlement to notice and a pre-seizure hearing.

Excerpts below set forth the court's reasoning in rejecting GRF's arguments concerning the meaning of §1702(a)(1)(B) and its entitlement to notice and pre-seizure hearing.

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* * * *

. . . GRF reads the word "interest" in § 1702(a)(1)(B) as referring to a *legal* interest, in the way that a trustee is legal owner of the corpus even if someone else enjoys the beneficial interest. See *Navarro Savings Association v. Lee*, 446 U.S. 458, 64 L. Ed. 2d 425, 100 S. Ct. 1779 (1980). The legal interest in GRF's property lies in the United States, but we need to know whether § 1702(a)(1)(B) refers to legal as opposed to beneficial interests. The function of the IEEPA strongly suggests that beneficial rather than legal interests matter. The statute is designed to give the President means to control assets that could be used by enemy aliens.

When an enemy holds the *beneficial* interest in property, that is a real risk even if a U.S. citizen is the legal owner. Consider for a moment what would happen if Osama bin Laden put all of his assets into a trust, under Illinois law, administered by a national bank. If the trust instrument directed the trustee to make the funds available for purchases of weapons to be used by al Qaeda, then foreign enemies of the United States would have an "interest" in these funds even though legal ownership would be vested in the bank. The situation is the same if al Qaeda incorporated a subsidiary in Delaware and transferred all of its funds to that corporation—something it could do without any al Qaeda operative setting foot in the United States. What sense could it make to treat al Qaeda's funds as open to seizure if administered by a German bank but not if administered by a Delaware corporation under terrorist control? Nothing in the text of the IEEPA suggests that the United States' ability to respond to an external threat can be defeated so easily. Thus the focus must be on how assets could be controlled and used, not on bare legal ownership. GRF conducts its operations outside the United States; the funds are applied for the benefit of non-citizens and thus are covered by § 1702(a)(1)(B).

* * * *

A foreign beneficial interest does not automatically make the funds subject to freeze. We have nothing to say here about whether GRF supports terrorism (as Treasury has concluded) or instead provides humanitarian relief (as it describes itself). That question is open to review in the district court, on the record compiled by the agency before it named GRF as a Specially Designated Global Terrorist. What we hold is that the phrase "property in which any foreign country or a national thereof has any interest" in § 1702(a)(1)(B) does not offer GRF a silver bullet that will terminate the freeze without regard to the nature of its activities.

None of GRF's constitutional arguments has that effect either.

* * * *

[T]he Constitution [does not] entitle GRF to notice and a pre-seizure hearing, an opportunity that would allow any enemy to spirit assets out of the United States. Although pre-seizure

hearing is the constitutional norm, postponement is acceptable in emergencies. See, e.g., *Gilbert v. Homar*, 520 U.S. 924, 930, 138 L. Ed. 2d 120, 117 S. Ct. 1807 (1997); *FDIC v. Mallen*, 486 U.S. 230, 240 (1988). . . .

(2) Constitutionality

On August 9, 2002, the U.S. District Court for the District of Columbia dismissed a challenge by Holy Land Foundation for Relief and Development ("HLF") to its designation as a Specially Designated Terrorist and a Specially Designated Global Terrorist and the resulting blocking of its assets. *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002). The Secretary of the Treasury had designated HLF, and the Office of Foreign Assets Control of the United States Department of the Treasury ("OFAC") had blocked all of its assets on December 4, 2001, pursuant to the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq. ("IEEPA"), and Executive Orders 13224 and 12947.** Among other things, HLF argued that the blocking order violated the First, Fourth and Fifth Amendments of the U.S. Constitution and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. ("RFRA").

The Secretary of the Treasury had determined that HLF was subject to Executive Orders 12947 and 13224 because it "acts for or on behalf of" Hamas, which had been designated under the two orders on January 23, 1995, and October 31, 2001.

The court found that the administrative record supported actions designating HLF and blocking its assets, rejecting

** E.O. 13224 is discussed *supra*, b.(1). HLF was designated a "Specially Designated Terrorist" under E.O. 12947, issued January 23, 1995, based on the finding that "grave acts of violence committed by foreign terrorists who threaten to disrupt the Middle East peace process" constitute an "unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." 60 Fed. Reg. at 5079. This Order has been renewed annually since 1995, most recently in 67 Fed. Reg. 3033 (2002).

HLF's claim that the actions were "arbitrary and capricious" in violation of the Administrative Procedure Act. The court also rejected Holy Land's other statutory and constitutional claims, with the exception of that based on the Fourth Amendment. The court denied plaintiff's request for preliminary injunction, concluding that plaintiff had not demonstrated a substantial likelihood of success on any of its claims:

> First . . . [a]lthough the Court has ruled that HLF has stated a constitutional claim on its Fourth Amendment claim and will be afforded an opportunity to prove it, the Court is not prepared to determine that HLF has a substantial likelihood of success on those allegations in light of the strong arguments advanced by the Government in support of its position. As to Plaintiff's likelihood of success on the APA, RFRA, and remaining constitutional claims, the Court has already concluded that they have no merit.
>
> Second, it is also clear that the injury to the Government and the public interest weigh against granting the preliminary injunction. Both the Government and the public have a strong interest in curbing the escalating violence in the Middle East and its effects on the security of the United States and the world as a whole. *Milena Ship Mgmt. Co. Ltd v. Newcomb,* 804 F. Supp. 846, 854 (E.D.La. 1992) (denying motion for preliminary injunction to unblock assets, despite showing of irreparable harm, because "the public interest overarches all else because of the world backdrop against which OFAC's action was taken"). Blocking orders are an important component of U.S. foreign policy, and the President's choice of this tool to combat terrorism is entitled to particular deference.

Excerpts below from the court's opinion address plaintiff's claim to a right to a pre-seizure hearing, distinguishing the case at hand from *NCRI*, noted at B.1.a.(2) *supra*, and plaintiff's claims that the blocking of its assets constituted an unconstitutional taking. At the end of 2002 an appeal by

Holy Land was pending in the U.S. Court of Appeals for the District of Columbia Circuit.

* * * *

. . . NCRI does not control this case. Here, the agency action was taken pursuant to the IEEPA-based sanctions program. Action under that program flows from a Presidentially declared national emergency. Thus, this case differs significantly from NCRI where neither a declaration of war (as required by the [Trading with the Enemy Act (TWEA)]) nor a Presidentially declared national emergency (as required by the IEEPA) existed to justify the absence of notice and an opportunity to be heard.

* * * *

. . . [T]he OFAC designation and blocking order served the important government interest, set forth in the Executive Orders issued by President Bush and President Clinton, of combating terrorism by cutting off its funding. See Haig v. Agee, 453 U.S. 280, 307, 69 L. Ed. 2d 640, 101 S. Ct. 2766 (1981). At the time of HLF's designation, less than three months had passed since the September 11, 2001 terrorist attacks on United States soil; President Bush had recently declared a national emergency in Executive Order 13224 to deal with the threat of future attacks and the need to curtail the flow of terrorist financing; President Clinton had issued Executive Order 12947 finding that the acts of violence committed by terrorists disrupting the Middle East peace process constituted an extraordinary threat to the United States; and the violence in the Middle East was escalating.

Second, prompt action by the Government was necessary to protect against the transfer of assets subject to the blocking order. Money is fungible, and any delay or pre-blocking notice would afford a designated entity the opportunity to transfer, spend, or conceal its assets, thereby making the IEEPA sanctions program virtually meaningless. . . .

* * * *

. . . The case law is clear that blockings under Executive Orders are temporary deprivations that do not vest the assets in

the Government. Therefore, blockings do not, as a matter of law, constitute takings within the meaning of the Fifth Amendment. Accordingly, courts have consistently rejected these claims in the IEEPA and TWEA context. . . .

. . . It is clear . . . that the current deprivation has not "gone too far," so as to constitute a taking, even though Plaintiff may some day have a more viable claim. . . .

* * * *

In sum, the Court concludes that HLF has sufficiently stated a Fourth Amendment violation based on the Government's physical entry onto its premises and removal of its property without a warrant. HLF has not, however, stated a claim as to the freezing of its assets, which does not constitute a Fourth Amendment seizure.

c. Delisting designated entities

In August 2002 the United States determined that certain individuals and entities that had been designated under Executive Order 13224 should be "delisted" because additional information established that they had no prior knowledge of the relevant group's involvement in terrorism and each had taken certain remedial actions to sever any ties with entities providing funds to support terrorism. The U.S. determination was reached after the committee established pursuant to UN Security Council Resolution 1267 removed the same individuals and entities from its consolidated list of individuals and entities associated with Usama bin Laden and the members of al Qaida and the Taliban. For further discussion of the delisting procedures adopted by the 1267 Committee, *see* Chapter 16.1.c.

At the end of 2002, litigation brought by two of the delisted businesses challenging their designation was pending in the U.S. District Court for the District of Minnesota. *Aaran Money Wire Service Inc. v. U.S.*, No. 02-CV-789 and *Global Services International, Inc. v. U.S.*, No. 02-CV-790.

d. Terrorist exclusion list

On December 5, 2001, the Secretary of State, in consultation with the Attorney General, designated 39 groups as "terrorist organizations" under § 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(vi)(II), as amended by section 411 of the USA PATRIOT Act of 2001. *See Digest 2001* at 921–923. A fact sheet issued by the Office of the Coordinator for Counterterrorism, U.S. Department of State, on November 15, 2002, explained the designation process and its legal effects. Excerpts are provided below.

The full text of the fact sheet, including names of those designated, is available at *www.state.gov/s/ct/rls/fs/2002/15222.htm*.

Section 411 of the USA PATRIOT ACT of 2001 (8 U.S.C. § 1182) authorized the Secretary of State, in consultation with or upon the request of the Attorney General, to designate terrorist organizations for immigration purposes. This authority is known as the "Terrorist Exclusion List (TEL)" authority. A TEL designation bolsters homeland security efforts by facilitating the USG's ability to exclude aliens associated with entities on the TEL from entering the United States.

Designation Criteria

An organization can be placed on the TEL if the Secretary of State finds that the organization:

- commits or incites to commit, under circumstances indicating an intention to cause death or serious bodily injury, 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.

Under the statute, "terrorist activity" means any activity that is unlawful under U.S. law or the laws of the place where it was committed and involves: hijacking or sabotage of an aircraft, vessel,

vehicle or other conveyance; hostage taking; a violent attack on an internationally protected person; assassination; or the use of any biological agent, chemical agent, nuclear weapon or device, or explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property. The definition also captures any threat, attempt, or conspiracy to do any of these activities.

Designation Process

The Secretary of State is authorized to designate groups as TEL organizations in consultation with, or upon the request of the Attorney General. Once an organization of concern is identified, or a request is received from the Attorney General to designate a particular organization, the State Department works closely with the Department of Justice and the intelligence community to prepare a detailed "administrative record," which is a compilation of information, typically including both classified and open sources information, demonstrating that the statutory criteria for designation have been satisfied. Once completed, the administrative record is sent to the Secretary of State who decides whether to designate the organization. Notices of designations are published in the Federal Register.

Effects of Designation
Legal Ramifications

Individual aliens providing support to or associated with TEL-designated organizations may be found "inadmissable" to the U.S., i.e., such aliens may be prevented from entering the U.S. or, if already in U.S. territory, may in certain circumstances be deported. Examples of activity that may render an alien inadmissible as a result of an organization's TEL designation include:

- membership in a TEL-designated organization;
- use of the alien's position of prominence within any country to persuade others to support an organization on the TEL list;

- solicitation of funds or other things of value for an organization on the TEL list; and
- solicitation of any individual for membership in an organization on the TEL list commission of an act that the alien knows, or reasonably should have known, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material for financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training to an organization on the TEL list.

(It should be noted that individual aliens may also found inadmissible on the basis of other types of terrorist activity unrelated to TEL-designated organizations; see 8 U.S.C. § 1182(a)(3)(B).)

Other Effects

1. Deters donation or contributions to named organizations.
2. Heightens public awareness and knowledge of terrorist organizations.
3. Alerts other governments to U.S. concerns about organizations engaged in terrorist activities.
4. Stigmatizes and isolates designated terrorist organizations.

* * * *

e. Review of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, and its Protocol

In November 2001 the International Maritime Organization ("IMO") agreed at its 22nd Assembly to undertake a review to determine whether relevant IMO instruments needed to be updated to enhance ship and port security and avert shipping from becoming a target of international terrorism. Resolution A.924(22).

On March 22, 2002, the United States submitted a proposal to the IMO for amendments to the Convention for

the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, and its Protocol of 1988 Relating to Fixed Platforms Located on the Continental Shelf, entered into force for the United States March 6, 1995, 1698 U.N.T.S. 201, 27 I.L.M. 668 (1988) ("SUA Convention and Protocol"). On May 7, 2002, the Legal Committee of the IMO accepted the U.S. proposal to establish a correspondence group, headed by the United States, to address the revision of the SUA Convention and Protocol. LEG 84/14. Annex 2 to the Report established terms of reference for the SUA correspondence group "to propose necessary amendments for the two instruments in order to facilitate, strengthen and expand international co-operation and co-ordination as a means of combating unlawful acts, including terrorist acts." The Legal Committee specifically noted the proposals made by the United States and Turkey. The United States proposal is set forth below.

The full text of the U.S. proposal is available at *www.uscg.mil/legal*. For relevant IMO documents, *see www.imo.org*.

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Review Process

4. The United States has reviewed the SUA Convention and Protocol while keeping in mind the objective of the review, as stated in resolution A.924(22). During the review, the United States noted the United Nations' recognition[2] that terrorism now operates globally, and therefore anti-terrorism efforts must be expanded from the currently fragmented domestic or regional approaches to a global approach. Fully endorsing the importance of international cooperation, the United States proposals set forth below reflect the goal of seeking ways to facilitate, strengthen and expand

[2] See U.N. S/RES/1373 (2001); U.N. A/RES/49/60 (Dec. 1994); and U.N. Sec-Gen speech 24 Oct. 1996.

international cooperation and coordination as a means of combating terrorism.

5. The United States review included soliciting input from interested sectors in the United States. Also, since the SUA Convention was drafted some fourteen years ago, and to introduce some systematic methodology in the review, the United States compared the SUA Convention to the most recently-drafted multilateral treaty relating to extradition and combating terrorism that has entered into force, the United Nations International Convention for the Suppression of Terrorist Bombings[3] (STB Convention).[4]

Adding Offences to Article 3

6. The tragic events of 11 September 2001 expanded the range of violent acts that now must be considered as realistic terrorist tactics. With that in mind, the United States has identified potential additional offences that should be considered for incorporation into the SUA Convention.

Harmful substances

7. The STB Convention explicitly addresses actions that use biological agents, toxic chemicals, radiation or radioactive materials to cause harm (see Article I, paragraph 3,b). In contrast, the SUA Convention currently does not clearly address the use of such harmful substances against the crew or passengers if the act does not endanger the safe navigation of the ship. The United States

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[3] U.N. International Convention for the Suppression of Terrorist Bombings, *opened for signature* 12 January 1998, UN doe. *A/RES/52/164*, S. TREATY Doe. No. 106-6, 37 I..L.M. 249 (entered into force 23 May 2001), available at <www.un.org/terrorism..>

[4] The U.N. International Convention for the Suppression of the Financing of Terrorism was also reviewed; however, since it was open for signature from 10 January 2000 to 31 December 2001 and will not be in force until 10 April 2002, the U.S. will only refer to the STB Convention in the main text of this document.

suggests adding language to article 3 of the SUA Convention that explicitly creates an offence of intentionally and unlawfully releasing harmful substances (such as biological agents, chemicals, or radiological materials) that have the capacity to cause death or serious bodily injury to the ship's crew or passengers but does not endanger the safe navigation of the ship.

Transportation of persons or supplies for committing SIUA Offences

8. The SUA Convention currently does not specifically prohibit knowingly and unlawfully providing international maritime transportation to persons who are known or suspected to have committed acts prohibited by the SUA Convention or other terrorism conventions. The SUA Convention also does not specifically prohibit knowingly and unlawfully providing international maritime transportation for supplies and other cargo that support acts prohibited by the SUA Convention or other terrorism conventions. The United States suggests supplementing article 3 with language that will clearly address these types of activities.

Non-proliferation

9. The United States suggests considering whether the SUA Convention should be amended to address the issue of transportation of items related to weapons of mass destruction and their means of delivery in violation of applicable international non-proliferation agreements, possibly including the creation of a new offence under the Convention. Because of the risk that such items could come into the possession of international terrorist organizations, the United States. believes that such consideration is warranted.

The ship as a weapon

10. As a direct result of the September 11 attack, the United States suggests adding to article 3 of the SUA Convention an offence that specifically criminalizes using the ship or its cargo as a weapon.

Covered acts could include intentionally and unlawfully ramming the vessel into another vessel, structure, facility or object. The United States acknowledges that article 3, paragraph 1(a) could be interpreted to cover some such scenarios, but the gravity of using a ship or its cargo as a weapon, similar to the way civil aircraft were used on September 11th, warrants coverage in a separate offence.

Organizer conspiracy

11. While paragraph 2(b) of article 3 of the SUA Convention covers anyone who abets the committing of the offence or is otherwise an accomplice to the offence (which obviously should include anyone who instigated, directed, organized or otherwise knowingly assisted in the commission of an offence), the STB Convention articulates more clearly the broad base of culpability of those who act as abettors and accomplices by specifically listing those who organize or direct others to commit such an offence as well as those who contribute to the commission of an offence by a group of persons acting with a common purpose (see article 2, paragraph 3).[5] Utilizing the more recent formulation used in the STB would better ensure that all who contribute to the commission of offences are clearly recognized to be covered tinder t e existing SUA Convention. Therefore, the United States suggests adding a subparagraph to article 3, paragraph 2 that expressly mentions that an act of an organizer or director of any of the offences listed in paragraph 1 of article 3 will be considered an offence. The United States also suggests adding another provision that further clarifies the culpability provisions of the SUA Convention by expressly mentioning the language, "knowingly assisting in a group's undertaking to commit an article . . . offence," found in the STB.

[5] The U.N. International Convention for the Suppression of the Financing of Terrorism also contains an even clearer expression of culpability (See Article 2, paragraph 5).

Piracy and armed robbery at sea

12. 1MO[6] and the United Nations General Assembly[7] have, as part of their global campaign to suppress acts of violence against persons on ships, repeatedly urged States that have not done so to consent to be bound by the SUA Convention. In considering this matter at IMO, some States have noted that not all acts of violence against persons on ships arc covered by article 3.[8] Any lacuna could possibly be remedied by appropriate amendment to article 3.

Updates Reflecting Evolving Multilateral Anti-Terrorism Treaty Concepts

13. Comparing the SUA Convention to the STE Convention reveals several other matters warranting consideration by the Committee.

Political exception

14. Article 11 of the STB Convention explicitly states that the offences set forth in the STB Convention will not be regarded as political offences for the purpose of extradition or mutual legal assistance. Article 11 continues by stating that a request for extradition or mutual legal assistance "may not be refused on the sole ground that it concerns a political offence." The STB Convention expressly precludes the exercise of the political offence exception and reflects the gradual narrowing of differences of opinion on defining terrorism. The United States suggests incorporating this concept into the SUA Convention.

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[6] Most recently in IMO Assembly resolution A.922 (22), and annexed Code of Practice for the investigation of the Crimes of Piracy and Armed Robbery against Ships, para. 3.2.

[7] Most recently in U.N. General Assembly Resolution A/RES/56/12, para. 32, 27 Nov. 2001.

[8] See, e.g., MSC 73/21, paras. 14.9, 14.20–14.25.

Transfer

15. Article 13 of the STB Convention establishes various conditions for the temporary transfer of a person in custody of one State Party to another State Party for the purpose of rendering assistance under the STB Convention (e.g. for testimony to assist prosecution of an offence). This temporary transfer language is also found in the U.N. Convention Against Transnational Organized Crime[9] (TOC Convention) in Article 18, paragraphs 10–12. The TOC Convention also explicitly applies the concept of transfer in the context of transfer of criminal proceedings, in Article 21, and transfer of sentenced persons, in Article 17. The United States suggests incorporating this concept into the SUA Convention.

Action requested of the Legal Committee

16. The Committee is invited to consider the suggestions contained in this document as well as other proposals that may be made prior to or at LEG 84 or thereafter, and to comment as it deems appropriate with a view toward moving forward in its review of the SUA Convention pursuant to resolution A.924(22). If the Committee decides to amend the SUA Convention accordingly, the U.S. respectfully requests the Committee convene an intersessional correspondence group to pursue this objective, which the U.S. is prepared to lead.

17. Any adjustments made to the SUA Convention should also be considered for the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, to the extent applicable.

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[9] U.N. Convention Against Transnational Organized Crime *opened for signature* 12 Dec. 2000, UN docs. A/55/383, A/RES/55/25, and located at 40 I.L.M. 335 (remains open for signature until 12 Dec. 2002), available at *http://www.odccp.orp/palermo/theconvention.html.*

f. Verdict in Libya terrorist case: Pan AM 103

On March 14, 2002, the Scottish High Court of Justiciary sitting in the Netherlands upheld the conviction of Abdel Al-Megrahi in the bombing of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988, killing 270 persons. *Megrahi v. Her Majesty's Advocate*, 2002 S.C.C.R. 509. It upheld a judgment of January 31, 2001, by a Scottish court sitting in the Netherlands that had been established expressly for the purpose of trying Al-Megrahi and Al-Amin Khalifa Fahima. Both the United States and United Kingdom had sought the two men for prosecution. The court had concluded it lacked sufficient evidence to convict Fahima. For background of the case and the U.S. role in it, see *Digest 2001* at 98–99. Excerpts from a press statement from the White House concerning the decision and related issues, dated March 14, 2002, are set forth below.

The full text of the press statement is available at *www.whitehouse.gov/news/releases/2002/03/20020314-1.html.*

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* * * *

The United States Government welcomes the decision of the Scottish High Court of Justiciary sitting in the Netherlands to uphold the conviction of Abdel Al-Megrahi. We reiterate the need for the Government of Libya to move quickly to satisfy its remaining obligations under UN Security Council resolutions related to the bombing of Pan Am Flight 103. The completion of the appeal does not end UN sanctions against Libya, but should spur Libya to take quick action to fully comply with the requirements of the UN Security Council.

We again express our deepest sympathy to the families of those lost in the bombing of Pan Am Flight 103. As we have stated previously, nothing can undo the suffering this act of terrorism has caused. However, we hope that all of those who lost loved-ones in this tragic attack will find some solace in the measure of justice achieved by today's decision.

This decision affirming the conviction of a Libyan agent for the bombing of Pan Am Flight 103 represents a vindication of efforts by successive U.S. administrations. It also underlines the unshakable determination of the United States not to forget, but to hold terrorists accountable for their acts.

* * * *

g. Inter-American Convention against Terrorism

On November 12, 2002, President George W. Bush transmitted the Inter-American Convention Against Terrorism, done at Barbados, signed June 3, 2002, to the Senate for advice and consent to ratification. S. Treaty Doc. No. 107–18 (2002). Excerpts below from the President's transmittal letter and from the accompanying report by the Secretary of State to the President describe the structure of the Convention and its importance in regional efforts to counter terrorism.

LETTER OF TRANSMITTAL

The White House, November 12, 2002.

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith, the Inter-American Convention Against Terrorism, adopted at the Thirty-Second Regular Session of the OAS General Assembly meeting in Bridgetown, Barbados, on June 3, 2002, and opened for signature on that date. At that time it was signed by 30 of the 33 members attending the meeting, including the United States. It has subsequently been signed by another two member states, leaving only two states that have not yet signed. In addition, I transmit herewith, for the information of the Senate, the report of the Department of State.

The negotiation of the Inter-American Convention Against Terrorism (the "Convention") was a direct response to the terrorist attacks on the United States on September 11, 2001. At that time, the OAS was meeting in Lima, Peru, to adopt a Democratic Charter

uniting all 34 democracies in the hemisphere. The OAS member states expressed their strong commitment to assist the United States in preventing such incidents from occurring again anywhere in our hemisphere. Within 10 days, the foreign ministers of the OAS member states, meeting in Washington, D.C., endorsed the idea of drafting a regional convention against terrorism. Argentina, Peru, Chile, and Mexico played particularly important roles in the development and negotiation of the Convention.

* * * *

In sum, the Convention is in the interests of the United States and represents an important step in the fight against terrorism. I therefore recommend that the Senate give prompt and favorable consideration to the Convention, subject to the understanding that are described in the accompanying report of the Department of State, and give its advice and consent to ratification.

George W. Bush.

LETTER OF SUBMITTAL

Department of State,
Washington, October 7, 2002.

The President,
The White House.

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Essential Elements of the Convention

The Convention is designed to build upon the multilateral and bilateral instruments already in force and to which the United States is a Party by enhancing cooperation in preventing, punishing, and eradicating terrorism. It does so by elaborating for regional use a variety of legal tools that have proven effective against terrorism and transnational organized crime in recent years.

Following the model of the 1999 International Convention for the Suppression of the Financing of Terrorism, the Convention

incorporates by reference the offenses set forth in ten counterterrorism instruments listed in paragraph 1 of Article 2 of the Convention. Negotiators chose this approach because of the breadth of converge already provided by these prior instruments (all crimes ordinarily recognized as terrorism-related offenses are covered, including hijackings, bombings, attacks on diplomats, and the financing of terrorism) and the OAS's desire to respond rapidly to the events of September 11 and the continuing threat of terrorism in the region.

All Parties are required under the Convention to "endeavor to become a party" to the ten prior [counterterrorism] instruments (the United States is already a Party to all of the instruments). In addition to facilitating implementation of the Convention, this obligation also advances implementation of UNSCR 1373, which "calls upon" states to become Parties to these same instruments "as soon as possible." Thus, we would hope that all Parties to the Convention will have become Parties to those instruments by the time they deposit their instruments of ratification for this Convention.

However, so as not to delay a state from becoming a Party to this Convention, and in order to preserve the prerogatives of the legislative bodies in becoming Parties to the instruments listed in the Convention, the Convention provides that a state may declare that the obligations contained in the Convention do not apply to the offenses set forth in any one of the counterterorism instruments listed in Article 2 if it is not yet a Party to that instrument or if it ceases to be a Party. This procedure provides a high degree of flexibility for states that are considering becoming Parties to this Convention, without undermining the U.S. interest in having all states become Parties to all of the other international instruments relating to terrorism.

In addition to incorporating the offenses from prior counterterrorism instruments, the Convention adopts elements from prior conventions and initiatives, in some cases expanding the scope of these elements and in other cases converting voluntary measures into legally binding ones. For example, Article 11 of the Convention prohibits Parties from denying extradition or mutual legal assistance requests on the sole ground that an offense covered by the Convention is or concerns a political offense. This provision appears

in the more recent counterterrorism instruments and, by incorporating it into the Convention, its scope will be expanded to include offenses set forth in prior conventions and protocols as well.

Another example is the Convention's requirement in paragraph 1 of Article 4 that Parties institute a legal and regulatory regime to prevent, combat, and eradicate the financing of terrorism. A similar requirement can be found in UNSCR 1373, but the Convention goes further by requiring that the regime include specific elements drawn from the forty recommendations of the Financial Action Task Force on Money Laundering (FATF), an inter-governmental body whose purpose is to develop and promote policies to combat money laundering. In fulfillment of one of its requirements, the United States will notify the OAS Secretary General, upon the deposit of its instruments of ratification, the national authority designated to be its financial intelligence unit.

In addition, paragraph 2 of Article 4 of the Convention mandates that, when establishing their legal and regulatory regimes, Parties must use as "guidelines" the recommendations developed by specialized international and regional entities, in particular the FATF and, as appropriate, the Inter-American Drug Abuse Control Commission, the Caribbean Financial Action Task Force, and the South American Financial Action Task Force, which are likewise inter-governmental bodies that develop policies relating to money laundering within their respective areas. Because the recommendations of these entities can change over time, the Convention requires that Parties use the recommendations of FATF, as well as the recommendations of the other entities, as "guidelines" in implementing paragraph 1 of Article 4, rather than requiring that the Parties implement all of those recommendations in full.

Other measures incorporated into the Convention include: expanding the basis for seizure and forfeiture of funds and other assets; expansion of predicate offenses for money laundering; enhancing cooperation on border controls and among law enforcement authorities; establishment of a mechanism for transferring persons in custody for identification, testimony or other types of assistance; and denial of refugee status in cases where there are serious reasons for considering that the person has committed an offense covered by the Convention.

The Convention facilitates the implementation of many of the mandatory measures called for in UNSCR 1373 by establishing mechanisms for cooperation in the region, and by mandating that Parties take specific, concrete steps that will advance their implementation of the more general measures set forth in that resolution. Those measures include: freezing funds or assets that are used in or form the proceeds of terrorist offenses; measures relating to the denial of refugee or asylum status; affording other Parties the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to terrorist acts; and detecting and preventing the movement of terrorists and terrorist groups by effective border controls and controls on the issuance of travel and identity documents.

Article 10 establishes a procedure whereby persons in custody may be transferred to another party for the purpose of providing assistance in obtaining evidence for the investigation or prosecution of any of the listed offenses. Under this Article, the transfer would take place with the person's consent and the agreement of the states sending and receiving the person. This provision is found in most modern U.S. mutual legal assistance treaties and in prior conventions relating to terrorism, in particular the 1997 International Convention on the Suppression of Terrorist Bombings and the 1999 International Convention on the Suppression of the Financing of Terrorism. As in those other legal instruments, it is not meant to be the exclusive means of transferring persons in custody but rather creates one possible modality for such transfers. While implicit, it may be useful in the context of the Convention to underscore this point, and I therefore recommend that the following understanding be included in the United States instrument of ratification:

> The United States of America understands that, as in other treaties with such provisions, nothing in Article 10 or in this Convention precludes the involuntary transfer of persons pursuant to applicable domestic or international law.

Article 15 confirms that the Convention's implementation will take place with full respect for the rule of law, human rights, and

fundamental freedoms. In addition, "international humanitarian law'' is included among the other rights and obligations of states and individuals under international law that are not affected by this Convention. In this respect, the term "international humanitarian law" is used in this Convention in the same context as it is used in the 1999 International Convention on the Suppression of the Financing of Terrorism and the 1997 International Convention on the Suppression of Terrorist Bombings. This term is not used by United States armed forces and could be subject to varied interpretations.

As was the case for those two earlier instruments, it is the United States' intention, in the context of this Convention, to interpret the term consistently with our understanding of the term "law of war." To confirm the U.S. understanding on this point. I recommend that the following understanding to Article 15, paragraph 2, be included in the United States instrument of ratification:

> The United States of America understands that the term "international humanitarian law" in paragraph 2 of Article 15 of the Convention has the same substantive meaning as the term "law of war."

Recent precedents exist for the conclusion of law enforcement-related treaties within the OAS framework. For example, the Inter-American Convention Against Corruption done at Caracas on March 29, 1996, was signed by the United States on June 2, 1996, and that Convention entered into force for the United States on October 29, 2000. The United States also signed the Inter-American Convention on Mutual Assistance in Criminal Matters done at Nassau on May 23, 1992, and a related Optional Protocol done at Managua on June 11, 1993, on January 10, 1995, and that Convention and its Optional Protocol entered into force for the United States on June 24, 2001.

* * * *

Respectfully submitted,

Colin L. Powell.

h. United States of America-ASEAN Joint Declaration for Cooperation To Combat International Terrorism

On August 1, 2002, in Brunei, the United States and the Association of Southeast Asian Nations ("ASEAN") reached agreement on the Joint Declaration for Cooperation to Combat International Terrorism, signed by U.S. Secretary of State Colin L. Powell for the United States and by Mohamed Bolkiah, Minister of Foreign Affairs, Brunei Darussalam, for ASEAN. At a joint press conference of ASEAN foreign ministers on the same day, Secretary of State Powell described the declaration as "focus[ing] on such issues as exchanging information, exchanging intelligence, building the capacity to do this in a more effective way and strengthening our bilateral ties. It is a political declaration of things ASEAN and the United States [can do] together in a more intimate relationship, and we will use this declaration in the months and years ahead to do more work together." In May the United States and Malaysia signed a similar declaration of cooperation. Excerpts from the joint declaration with ASEAN are provided below.

The full text of the joint press conference is available at *www.state.gov/secretary/rm/2002/12410.htm*. The joint declaration is available at *www.state.gov/p/eap/rls/ot/12428pf.htm*.

The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, the Socialist Republic of Viet Nam, member countries of the Association of Southeast Asian Nations (ASEAN), and the United States of America (hereinafter referred to collectively as "the participants");

* * * *

Solemnly declare as follows;

* * * *

Scope and Areas of Cooperation

3. The participants stress their commitment to seek to implement the principles laid out in this Declaration, in accordance with their respective domestic laws and their specific circumstances, in any or all of the following activities:

I. Continue and improve intelligence and terrorist financing information sharing on counter-terrorism measures, including the development of more effective counter-terrorism policies and legal, regulatory and administrative counter-terrorism regimes.

II. Enhance liaison relationships amongst their law enforcement agencies to engender practical counter-terrorism regimes.

III. Strengthen capacity-building efforts through training and education; consultations between officials, analysts and field operators; and seminars, conferences and joint operations as appropriate.

IV. Provide assistance on transportation, border and immigration control challenges, including document and identity fraud to stem effectively the flow of terrorist-related material, money and people.

V. Comply with United Nations, Security Council Resolutions 1373, 1267, 1390 and other United Nations resolutions or declarations on international terrorism.

VI. Explore on a mutual basis additional areas of cooperation.

Participation

4. Participants are called upon to become parties to all 12 of the United Nations conventions and protocols relating to terrorism.

5. The participants are each called upon to designate an agency to coordinate with law enforcement agencies, authorities dealing with countering terrorism financing and other concerned government agencies, and to act as the central point of contact for the purposes of implementing this Declaration.

* * * *

i. APEC leaders' statement

On October 26, 2002, the Asia Pacific Economic Cooperation forum ("APEC") released a statement of its leaders, Fighting

Terrorism and Promoting Growth, at the conclusion of the annual APEC leaders' meetings in Los Cabos, Mexico. President George W. Bush joined leaders from other countries in agreeing to specific, additional joint actions "to fully implement the broad commitments" of the 2001 Shanghai Counter-Terrorism Statement. In issuing the statement, the leaders "endeavor[ed] to ensure that key Pacific Rim infrastructure in the areas of trade, finance and information systems" is protected. A fact sheet released by the White House on the same day described the results as follows:

> In a show of unity by economies representing 60 percent of global GDP and one quarter of the world's Muslim population, APEC Leaders agreed on a U.S.-proposed plan to protect key transport, finance and information systems from terrorists by enhancing secure trade, choking off terrorist financing, and promoting cyber security. This plan complements the "Smart Border" programs President Bush has launched with Mexico and Canada.

A key component of the undertaking is referred to as Enhancing Secure Trade in the APEC Region ("STAR"). As indicated in the fact sheet:

> APEC economies account for 21 of the world's top seaports, and 23 of the world's busiest airports. Today, APEC members committed to accelerated action on pre-screening people and cargo, increasing security on ships and planes, and enhancing security in airports and seaports.
>
> * * * *
>
> . . . APEC-wide efforts to strengthen transport security are complemented by the U.S. bilateral Container Security Initiative (CSI), which revolutionizes border management through pre-screening of cargo containers. The CSI has been expanded to include key APEC megaports in Canada, Hong Kong, Japan and Singapore. Earlier this week the Untied States announced that China had become the newest CSI participant.

The full text of the fact sheet is available at *www.state.gov/p/eap/rls/14705.htm*.

j. "Smart border" initiatives with Mexico and Canada

On December 6, 2002, the White House released an updated report on U.S. efforts to work with Canada to implement a smart-border action plan to enhance security along the border shared by the two countries, available at *http://usinfo.state.gov/topical/pol/terror/02120601.htm*. The plan, signed by President Bush and Canadian Prime Minister Jean Chrétien in December 2001, aims to secure the cross-border flow of goods and people, protect infrastructure, and improve information-sharing and coordination to enhance these objectives.

A summary of the status, as of March 21, 2002, of a twenty-two point U.S.-Mexico Border Partnership Action Plan is available at *www.whitehouse.gov/infocus/usmxborder/22points.html*.

k. G8 Recommendations on Counter-Terrorism

The G8, an informal group of eight countries, consisting of Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States, held a summit meeting in June 2002 at Kananaskis, Alberta, Canada. The foreign ministers' meeting of the G8, June 12–13, 2002, adopted revised recommendations on counter-terrorism, "compris[ing] standards, principles, best practices, actions and relationships that the G8 views as providing improvements to the mechanisms, procedures and networks that exist to protect our societies from terrorist threats. They are intended as commitments by the G8, which we commend as guiding principles to all States." G8 Recommendations on Counter-Terrorism, available at *www.library.utoronto.ca/g7/foreign/fm130602f.htm*. The document also took note of the revised recommendations of the G8 crime group, known as the Lyon Group. The

revised Lyon Group Recommendations, entitled the G8 Recommendations on Transnational Crime, endorsed by G8 Ministers of Justice and the Interior (Mont-Tremblant, May 13–14, 2002), is available at *www.g8j-i.ca/english/doc1.html*.

2. Narcotrafficking

a. Modifications to U.S. narcotics certification process

(1) Temporary modification for 2002

Section 591 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act ("FOAA"), FY 2002, Pub. L. No. 107–115, 115 Stat. 2118, modified the narcotics certification procedures during fiscal year 2002 for countries on the list of major illicit drug producing or drug-transit countries. Under pre-existing law, § 490 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291j, the President was required to provide a list of such countries by November 1 of each year, and to withhold 50 percent of most forms of foreign assistance allocated to them pending final certification of their compliance with their international counternarcotics obligations. The President was required to certify by March 1 of the following year that each country on the list had cooperated fully or taken adequate steps on its own to achieve full compliance with the goals and objectives established by the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, UN Doc. No. UNE/CONF.82 (092)/UN2. Countries that were not so certified could not receive most forms of financial assistance unless the President certified that the vital national interests of the United States required the assistance to be provided.

Under § 591, for FY 2002 only, the President was required to submit a report no later than 45 days after the Act was enacted (*i.e.*, it was to be submitted by February 24, 2002) that identified each country that the President had determined to be a major drug-transit or major illicit drug producing country. Section 591 also required the President to identify

any country on the list that had "failed demonstrably . . . to make substantial efforts" during the previous 12 months to adhere to international counternarcotics agreements and to take certain counternarcotics measures set forth in U.S. law. U.S. assistance appropriated under the authority of the FOAA for FY 2002 could not be provided to any country designated as having "failed demonstrably" unless the President determined that the provision of such assistance was vital to U.S. national interests or that the country, at any time after the President's initial report to Congress, had made "substantial efforts" to comply with the counternarcotics conditions in the legislation. In reaching this determination, the President was required to consider each country's performance in areas such as stemming illicit cultivation, extraditing drug traffickers, and taking legal steps and law-enforcement measures to prevent and punish public corruption that facilitates drug trafficking or impedes prosecution of drug-related crimes. The President was also required to consider efforts taken by these countries to stop the production and export of, and reduce the domestic demand for, illegal drugs.

The prohibition on assistance did not affect humanitarian and counternarcotics assistance, nor certain other types of assistance that are authorized to be provided notwithstanding any other provision of law.

On February 23, President Bush identified Afghanistan, Burma, and Haiti as having failed demonstrably to make substantial efforts against illegal drug production and trafficking during the previous 12 months. U.S. assistance under the FOAA could be provided to these countries only if the President determined and reported to Congress that provision of such assistance to these countries was vital to the national interests of the United States, notwithstanding their counternarcotics performance. The President made this determination with respect to Afghanistan and Haiti, but not as to Burma. 67 Fed. Reg. 8,889 (Mar. 5, 2002).

Excerpts from the memorandum from the President to the Secretary of State under section 591 are provided below.

This report is submitted under section 591 of the Kenneth H. Ludden Foreign Operations, Export Financing and Related Programs Appropriations Act, 2002 (P.L. 107–115) (the "FY 2002 FOAA"). Pursuant to section 591 of the FY 2002 FOAA, 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. I previously identified these same countries as major drug-transit or major illicit drug producing countries on November 1, 2001, pursuant to section 490(h) of the Foreign Assistance Act of 1961, as amended (the "FAA").

Pursuant to section 591 of the FY 2002 FOAA, I hereby designate Afghanistan, Burma and Haiti as countries that failed demonstrably, during the previous 12 months, to adhere to their obligations under international counternarcotics agreements and to take the counter-narcotics measures set forth in section 489(a)(1) of the FAA. I have attached a justification for each of the countries so designated, as required by section 591.

Pursuant to section 591(3), I hereby also determine that provision of United States assistance to Afghanistan and Haiti in FY 2002 under the FY 2002 FOAA is vital to the national interests of the United States.

* * * *

(2) Permanent legislative change

On September 30, 2002, President George W. Bush signed into law the Foreign Relations Authorization Act for Fiscal years 2002 and 2003, Pub. L. No. 107–228, 116 Stat. 1350. Section 706 of that act provided new drug-control certification procedures as a permanent change in law, 22 U.S.C. § 2291j–1. The new legislation was similar to that in effect temporarily for 2002, discussed in part (i) *supra*, with some additional changes. Section 706 requires that the President submit to Congress a report identifying major drug transit and illicit

drug producing countries no later than September 15 of each year. The President is to designate any of the countries identified on this list that have "failed demonstrably" during the previous twelve months to make adequate efforts to fight narcotrafficking, triggering limitations on assistance for the subsequent fiscal year. The act also authorizes the President to apply the current permanent legislation, found in section 490(a) through (h) of the Foreign Assistance Act of 1961, as amended, instead of these new procedures.

b. International Narcotics Control Strategy Report

The amendments effective for 2002 did not alter the requirement for an International Narcotics Control Strategy Report to be filed by March 1, 2002. The excerpt below from the introduction to the report filed on that date describes the legal basis and purpose of the annual report.

The full text of the report is available at *www.state.gov/g/inl/rls/ncrcpt/2001.*

The Department of State's International Narcotics Control Strategy Report (INCSR) has been prepared in accordance with section 489 of the Foreign Assistance Act of 1961, as amended (the "FAA," 22 U.S.C. § 2291). The 2002 INCSR is the sixteenth annual report prepared pursuant to the FAA. In addition to addressing the reporting requirements of section 489 of the FAA (as well as sections 481(d)(2) and 484(c) of the FAA and section 804 of the Narcotics Control Trade Act of 1974, as amended), the INCSR provides the factual basis for the designations contained in the President's report to Congress on the major drug-transit or major illicit drug producing countries pursuant to section 591 of the Kenneth M. Ludden Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002 (P.L. 107–115) (the "FOAA").

The FAA requires a report on the extent to which each country or entity that received assistance under chapter 8 of Part I of the

Foreign Assistance Act[1] in the past two fiscal years has "met the goals and objectives of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" (the "1988 UN Drug Convention"). FAA § 489(a)(1)(A).

Although the Convention does not contain a list of goals and objectives, it does set forth a number of obligations that the parties agree to undertake. Generally speaking, it requires the parties to take legal measures to outlaw and punish all forms of illicit drug production, trafficking, and drug money laundering, to control chemicals that can be used to process illicit drugs, and to cooperate in international efforts to these ends. The statute lists action by foreign countries on the following issues as relevant to evaluating performance under the 1988 UN Drug Convention: illicit cultivation, production, distribution, sale, transport and financing, and money laundering, asset seizure, extradition, mutual legal assistance, law enforcement and transit cooperation, precursor chemical control, and demand reduction.

In attempting to evaluate whether countries and certain entities are meeting the goals and objectives of the 1988 UN Drug Convention, the Department has used the best information it has available. The 2002 INCSR covers countries that range from major drug producing and drug-transit countries, where drug control is a critical element of national policy, to small countries or entities where drug issues or the capacity to deal with them are minimal. The reports vary in the extent of their coverage. For key drug-control countries, where considerable information is available, we have provided comprehensive reports. For some smaller countries or entities where only sketchy information is available, we have included whatever data the responsible [U.S. diplomatic] post could provide.

* * * *

c. Money laundering

Section 311 of the USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272, 31 U.S.C. § 5318A, 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 order to designate a jurisdiction under this provision, the Secretary of the Treasury is required to consult with the Secretary of State and the Attorney General. The Secretary of the Treasury delegated his authority under this section to the Under Secretary of the Treasury (Enforcement). On December 20 the Under Secretary exercised this authority for the first time. A Notice of Designation issued that day designated the jurisdictions of Nauru and Ukraine as primary money-laundering concerns. 67 Fed. Reg. 78,859 (Dec. 26, 2002). Excerpts below provide background on the designations; analysis of each of the two countries is also provided in the Federal Register notice.

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II. Imposition of Special Measures

The Department of the Treasury places these jurisdictions, and those with whom they have dealings, upon notice of its intent, after appropriate consultation, to follow this designation with the imposition of special measures authorized by section 5318A(a).

With respect to Nauru, Treasury intends to impose the special measure described in section 5318A(b)(5), which will prohibit financial dealings by U.S. financial institutions with any Nauru licensed institution, unless otherwise excepted. Under the terms of section 5318A(a)(2)(C), this special measure can be imposed only by promulgation of a rule. Treasury intends to initiate a rulemaking shortly.

With respect to Ukraine, Treasury intends to impose one or more of the information-gathering and record-keeping requirements of the special measures described in section 5318A(b)(1) through (4). Those special measures can be imposed by an order, which is limited in duration to 120 days, and which may be extended indefinitely through a rulemaking (see section

5318A(a)(2) and (3)). Treasury intends to issue an order while simultaneously initiating a rulemaking to impose special measures on Ukraine.

* * * *

IV. Background

On October 26, 2001, the President signed into law the USA PATRIOT Act. Title III of the Act makes a number of amendments to the anti-money laundering provisions of the Bank Secrecy Act (BSA), which are codified in subchapter II of chapter 53 of title 31, United States Code. These amendments are intended to make it easier to prevent, detect, and prosecute international money laundering and the financing of terrorism.

BSA section 5318A, as added by section 311 of the Act, authorizes the Secretary of the Treasury (Secretary) to designate a foreign jurisdiction, institution, 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 a jurisdiction, institution, class of transactions, or type of account. The Secretary has delegated his authority under section 5318A to the Under Secretary of the Treasury (Enforcement). Section 5318A specifies those factors that the Secretary must consider before designating a jurisdiction, institution, transaction, or account as of "primary money laundering concern." The evaluation of these factors against the summary of the administrative record, as subsequently set forth in this designation, has resulted in the conclusion that both jurisdictions are of primary money laundering concern.[1] Once the Secretary has considered the factors,

[1] The following factors, in accordance with the requirements of section 5318A(c)(2)(A), are considered to be potentially relevant factors in evaluating the necessity of designating Nauru and Ukraine. Nauru and Ukraine meet the majority of these factors. First, whether organized criminal groups, international terrorists, or both, have transacted business within the designated jurisdiction. Second, with respect to its banking practices, Treasury must also evaluate (1) the extent to which the jurisdiction or financial institutions operating in the jurisdiction offer bank secrecy or special regulatory advantages to nonresidents or nondomiciliaries of the jurisdiction; (2) the substance and quality of administration of the bank supervisory and counter-money

consulted with the Secretary of State and the Attorney General (or their designees), and made a finding that a jurisdiction is a primary money laundering concern, the Secretary is authorized to impose one or more of the five "special measures" described in 5318A(b). These special measures can be imposed individually, jointly, or in combination with respect to a designated "primary money laundering concern." Four of the special measures impose information-gathering and record-keeping requirements upon those domestic financial institutions and agencies dealing either directly with the jurisdiction designated as one of primary money laundering concern, or dealing with those having direct dealings with the designated jurisdiction.[2] Those four measures require: (1) keeping records and filing reports on particular transactions, including the identities of the participants in the transactions and the beneficial owners of the funds involved; (2) obtaining information on the beneficial ownership of any account opened or maintained in the United States by a foreign person or a foreign person's representative; (3) identifying and obtaining information about customers permitted to use, or whose transactions are routed through, a foreign bank's "payable-through" account; or (4) identifying and obtaining information about customers permitted to use, or whose transactions are routed through, a foreign bank's "correspondent" account.

Under the fifth special measure, a domestic financial institution or agency may be prohibited from opening or maintaining in

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laundering laws of the jurisdiction; (3) the relationship between the volume of financial transactions occurring in the jurisdiction and the size of the economy of the jurisdiction; and (4) the extent to which the jurisdiction is characterized as an offshore banking or secrecy haven by credible international organizations or multilateral expert groups. Third, with respect to its enforcement mechanisms, Treasury must evaluate whether the United States has a mutual legal assistance treaty with the jurisdiction, and determine the experience of United States law enforcement officials and regulatory officials in obtaining information about transactions originating in, or routed through to, such jurisdiction. Finally, Treasury must evaluate the extent to which the jurisdiction is characterized by high levels of official or institutional corruption.

[2] Treasury is currently examining the extent of the applicability of these requirements on those financial institutions enumerated under the USA PATRIOT Act.

the United States a correspondent account or a payable-through account for or on behalf of a foreign financial institution if the account involves the designee.

In selecting which special measures to impose, the Secretary must consider a number of factors.[3] In addition, imposition of special measures (1) through (4) requires consultation with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act), the Secretary of State, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the National Credit Union Administration Board, and any other agencies and interested parties as the Secretary may find appropriate. Imposition of special measure (5) requires consultation with the Secretary of State, the Attorney General and the Chairman of the Board of the Federal Reserve System.

The Treasury intends, after consultation as provided above, to impose the fifth special measure with respect to Nauru, and actions under special measures one through four with respect to Ukraine. Section 5318A lists several factors that the Secretary must consider, in consultation with the Secretary of State and the Attorney General, before imposing these special measures. Pursuant to section 5318A, any of these first four special measures can be imposed by order, regulation or as otherwise permitted by law. Special measures imposed by an order can be effective for not more than 120 days, unless subsequently continued by a regulation promulgated before the end of the 120-day period.

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[3] In determining generally what special measures to select and to impose, the Secretary, in consultation with the agencies and "interested parties" set forth immediately above, must consider the following factors: (1) whether similar action has been or is being taken by other nations or multilateral groups; (2) whether the imposition of any particular special measure would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for financial institutions organized or licensed in the United States; (3) the extent to which the action or the timing of the action would have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the particular jurisdiction, institution or class of transactions; and (4) the effect of the action on United States national security and foreign policy.

The fifth special measure can only be imposed through the issuance of a regulation. The issuance of the fifth measure also requires consultation with the Chairman of the Federal Reserve.

* * * *

3. Jurisdiction in U.S. Courts

a. Crime occurring in Mexican territorial waters

On November 20, 2002, the U.S. Court of Appeals for the Ninth Circuit affirmed the conviction of a man for sexual contact with a minor in violation of 18 U.S.C. § 2244(a)(3) occurring in Mexican territorial waters on a cruise ship departing from and returning to an American port. *U.S. v. Neil*, 312 F.3d 419 (9th Cir. 2002). Section 2244(a)(3) of title 18 of the U.S. Code criminalizes such sexual contact "in the special maritime and territorial jurisdiction of the United States." That term is defined, as relevant here, to include "to the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States." 18 U.S.C. § 7(8).

Excerpts below from the court of appeals decision describe the court's application of the two-part inquiry under U.S. law in upholding the exercise of jurisdiction in this case. Internal citations have been omitted.

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* * * *

We hold that the United States properly exercised jurisdiction. The Constitution does not bar extraterritorial application of United States penal laws. However, acts of Congress generally do not have extraterritorial application unless Congress clearly so intends.

We undertake a two-part inquiry to determine whether extraterritorial jurisdiction is proper. First, we look to the text of the statute for an indication that Congress intended it to apply extraterritorially. Second, we look to the operation of the statute

to determine whether the exercise of extraterritorial jurisdiction complies with principles of international law. Because the statute in question here explicitly applies outside the United States and because exercising jurisdiction does not offend any principle of international law, we hold that extraterritorial jurisdiction is proper.

* * * *

Congress has defined the "special maritime and territorial jurisdiction of the United States" as including, "to the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States." 18 U.S.C. § 7(8). The criminal sexual contact between Neil and the victim occurred on a foreign vessel that departed from and arrived in the United States, and the victim was a United States national. This conduct thus falls squarely into the definition of special maritime and territorial jurisdiction set out in § 7(8).

* * * *

International law clearly supports extraterritorial jurisdiction in this case. Two principles of international law permitting extraterritorial jurisdiction are potentially relevant: the territorial principle and the passive personality principle. Under the territorial principle, the United States may assert jurisdiction when acts performed outside of its borders have detrimental effects within the United States. The sexual contact occurred during a cruise that originated and terminated in California. Neil's conduct prompted an investigation by the FBI, and an agent arrested Neil in the United States. The victim was an American citizen who lives and goes to school in the United States, and who sought counseling in this country after the attack. These facts are enough to support jurisdiction under the territorial principle.

Extraterritorial jurisdiction is also appropriate under the passive personality principle. Under this principle, a state may, under certain circumstances, assert jurisdiction over crimes committed

against its nationals. We have previously sustained jurisdiction based on the passive personality principle.

* * * *

. . . By contrast [with *U.S. v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994), interpreting 18 U.S.C. § 1959, which "does not explicitly state that it applies extraterritorially"], § 2244(a)(3) relies on § 7(8), which invokes the passive personality principle by explicitly stating its intent to authorize extraterritorial jurisdiction, to the extent permitted by international law, when a foreign vessel departs from or arrives in an American port and an American national is a victim. We conclude that the passive personality principle is appropriately invoked to justify the exercise of extraterritorial jurisdiction in the circumstances specified in the statute.

* * * *

b. Crime occurring on high seas

(1) Violence against maritime navigation

On April 4, 2002, a federal grand jury indicted a national of the People's Republic of China for allegedly killing two persons in connection with his seizure of control over a fishing vessel *Full Means No. 2* by force and threat. The *Full Means No. 2* was a Taiwanese-owned vessel flying the flag of the Republic of Seychelles. The U.S. Coast Guard intercepted the vessel and boarded with the authorization of the Seychelles. The crew had overpowered the alleged murderer and had detained him in a stateroom. The United States obtained authorization from the Seychelles government to exercise jurisdiction over the vessel and the alleged assailant. The indictment charged violations of 18 U.S.C. § 2280(a)(1)(A), (B), (G) and (H), implementing U.S. obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 ("the Convention"). Section 2280(b)(1)(C) establishes jurisdiction

over activities prohibited if "the offender is later found in the United States after such activity is committed."

Persons being held as material witnesses in the case moved to quash the indictment for lack of jurisdiction. On April 18, 2002, the U.S. District Court for the District of Hawaii denied the motion, explaining that under Article 8 of the Convention, the master of a ship may deliver a person suspected of violating the Convention to any state party, which is then obligated to either extradite or prosecute the alleged offender under its laws. *U.S. v. Yan Long Xiong*, Misc. 02-00044 SOM-LEK. The court noted that the Convention "clearly contemplates situations where suspects will be brought involuntarily by the ship's master to a state having no connection with the offense for the purpose of extradition or prosecution." The litigation was pending at the end of 2002.

(2) Maritime Drug Law Enforcement Act

On May 14, 2002, the U.S. Court of Appeals for the Fifth Circuit upheld jurisdiction in U.S. federal court over the captain of a ship with no apparent connection with the United States charged with conspiracy to violate the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. app. § 1901 et seq. *U.S. v. Suerte*, 291 F.3d 366 (5th Cir. 2002). As described in the court of appeals opinion, the defendant, a Philippine national and resident of Colombia, was captain of a freighter registered in Malta and owned by a member of a Colombian/Venezuelan drug trafficking organization. The United States boarded the ship on the high seas with permission from Malta. Subsequently, Malta waived objection to the enforcement of U.S. law over the freighter and its crew. Suerte was arrested and indicted for conspiracy to possess, with intent to distribute, more than five kilograms of cocaine on board a vessel subject to U.S. jurisdiction, in violation of the Maritime Drug Law Enforcement Act, 46 U.S.C. app. § 1903. Section 1903(c)(1)(C) defines a "vessel subject to the jurisdiction of the United States" to include "a vessel registered in a

foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States."

The court of appeals first found no violation of the Due Process Clause of the U.S. Constitution. Noting that the Constitution expressly provides that "the Congress shall have power . . . to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations" (Piracies and Felonies Clause), U.S. CONST. art. I, sec. 8, cl. 10, the court concluded:

> . . . [W]e hold that, for the MDLEA issue at hand, and to the extent the Due Process Clause may constrain the MDLEA's extraterritorial reach, that clause does not impose a nexus requirement, in that Congress has acted pursuant to the Piracies and Felonies Clause. Again, that clause is "the only specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States." [CONGRESSIONAL RESEARCH SEVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES, ANALYSIS and INTERPRETATION, S. Doc. No. 103–6, at 04 (Johnny H. Killian & George A. Costello eds., 1992)].

The court then turned to a consideration of requirements under international law, concluding that it imposed no nexus requirement. Excerpts below provide the court's analysis of the international law applicable to the case.

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Malta, under whose flag Suerte's vessel was registered, consented to the boarding and search of his vessel, as well as to the application of United States law. A flag nation's consent to a seizure on the high seas constitutes a waiver of that nation's rights under international law. *See United States v. Williams*, 617 F.2d 1063, 1090 (5th Cir. 1980) (en banc). "Interference with a ship that would otherwise be unlawful under international law

is permissible if the flag state has consented". RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 522 cmt. e (1987); *see also Robinson*, 843 F.2d at 4.

Along this line, and as noted, the MDLEA provides "[A] 'vessel subject to the jurisdiction of the United States' includes . . . a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States". 46 U.S.C. App. § 1903(c)(1)(C). This codifies the above-described generally accepted principle of international law: a flag nation may consent to another's jurisdiction. *See* RESTATEMENT (THIRD) § 522 reporters note 8 (the MDLEA "*confirmed the practice*" of relying on informal grants of consent by flag nations (emphasis added)); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 3–12 n.41 (3d ed. 2001) (the principle that flag-nation consent satisfies international law requirements "is *confirmed* by the MDLEA" (emphasis added)). Such an agreement between the United States and a flag nation to apply United States law on a flag-nation vessel may be made informally. *Robinson*, 843 F.2d at 4; *see also* RESTATEMENT (THIRD) § 301 & cmt. b. (international agreements need not be formalized, nor need they be in writing).

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Again, the power "to define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations" is "the *only* specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States". S. DOC. NO. 103–6, at 304 (emphasis added). The MDLEA represents an extremely limited exercise of that power. For certain persons not aboard United States vessels or in United States customs waters, it proscribes drug trafficking only aboard a stateless vessel or, as in the case at hand, a vessel whose flag nation consents to enforcement of United States law.

Enforcement of the MDLEA in these circumstances is neither arbitrary nor fundamentally unfair (the due process standard agreed upon by Suerte and the Government). Those subject to its reach are on notice. In addition to finding "that trafficking in controlled substances aboard vessels . . . presents a specific threat to the security

and societal well-being of the United States", Congress has also found that such activity "is a serious *international* problem and is *universally* condemned". 46 U.S.C. App. § 1902 (emphasis added). Along this line, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* 20 Dec. 1988, 28 I.L.M. 493, to which Malta and the United States are signatories, provides as its purpose: "to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension". *Id.* art.2.

C. INTERNATIONAL CRIMINAL TRIBUNALS

1. Ad Hoc Tribunals and Related Issues

a. International Criminal Tribunal for Rwanda

(1) Reward for information leading to the apprehension of Felicien Kabuga

On June 12, 2002, Ambassador Pierre-Richard Prosper, Officer of War Crimes issues, U.S. Department of State, speaking in Nairobi, Kenya, announced a reward program aimed at persons indicted by the International Criminal Tribunal for Rwanda. The initial step in this program was the offer of a reward for information leading to the apprehension of Felicien Kabunga, as explained in excerpts from the press release below.

The full text of the press release is available at *www.state.gov/s/wci/rls/rm/2002/11012.htm*.

Today, the United States of America is announcing the beginning of an aggressive and targeted campaign to apprehend key persons indicted by the United Nations International Criminal Tribunal for Rwanda for serious violations of international humanitarian law, including genocide, crimes against humanity and war crimes. . . .

As many of you know, the United States has been a leader in seeking accountability for grave violations of international humanitarian law. Our Rewards for Justice program has been an indispensable tool in our effort to bring perpetrators to justice. We have used this program in the war on terror and in the former Yugoslavia in pursuit of notorious persons indicted for war crimes, including Slobodan Milosevic, Radovan Karadzic, and Ratko Mladic. Today we are bringing this tool to bear on those individuals who have been indicted by the ICTR for serious violations of international humanitarian law, that is, those most responsible and most wanted for the Rwandan genocide. Our goal is to search for each key indicted individual one by one until they are apprehended and brought into the custody of the Tribunal. This effort is done under the authority of Public Law 106–277 (October 2000) sponsored by Senator Feingold (D-WI).

We begin our campaign today in search of a man accused of being the main supporter and financier of the *Interahamwe* militia who were behind the massacre of over 800,000 of Rwanda's men, women, and children in 100 days of terror. The name of this fugitive from justice is Félicien Kabuga.

Mr. Kabuga is a wealthy businessman who is accused of using his vast assets to propel the Rwandan massacres, firstly, by affording a platform to disseminate the message of ethnic hatred through the radio station, *Radio Télévision Libre des Mille Collines* (RTLM), and secondly, by providing logistic support such as weapons, uniforms, and transportation to the *Interahamwe* militia group of the *Mouvement Républicain National pour le Démocratie et le Développement* (MRND) and the militia of *Coalition pour la Défense de la République* (CDR).

Félicien Kabuga is accused of planting the seeds of the massacre by propagating extremist Hutu ideology and its message of ethnic hatred and violence, and thus, contributing to the genocidal indoctrination of the Rwandan people. As an example of his commitment to this evil, when asked to stop broadcasting messages inciting inter-ethnic hatred, Félicien Kabuga defended and continued the broadcasts on the radio station he dedicated to "Hutu Power," according to the indictment.

Félicien Kabuga is accused of exercising considerable influence over the MRND and CDR members, militiamen, and the local authorities as their main financier and backer. It is these local authorities and militiamen, in complicity with members of the military, who massacred the Tutsi population and moderate Hutu throughout the Rwandan territory.

Félicien Kabuga is also accused of distributing weapons with the intent to exterminate the Tutsi population and eliminate its "accomplices." Through his company Félicien Kabuga is alleged to have made massive purchases of machetes, hoes, and other agricultural implements knowing that they would be used as weapons of murder.

For these alleged acts, Mr. Kabuga is indicted for genocide, crimes against humanity, and violations of the Geneva Convention. It is now time to bring him to justice. It is time for Mr. Kabuga to come out of hiding and face the charges against him. It is time for those who have information to come forward and time for those who are harboring Félicien Kabuga to cease their protection.

Félicien Kabuga is believed to frequent Kenya, Europe, and other countries such as Madagascar and Gabon. Through this advertising campaign, and with the help of the Kenyan officials and citizens, we will begin the search for him here in Kenya. . . .

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We ask all governments to meet their international obligation and join us in our effort. We ask all governments to lend full assistance to this campaign and assist in the apprehension of fugitives hiding from the International Criminal Tribunal for Rwanda. To combat atrocities and end abuses and inhumanity we must stand together.

* * * *

(2) Rewards concerning persons associated with the Congo region

On July 29, 2002, Ambassador Prosper announced a further step in the effort to bring fugitives indicted by the International Criminal Tribunal for Rwanda to justice. Speaking in

Kinshasa, Democratic Republic of the Congo, he announced rewards for information leading to the apprehension of eight persons known to have spent time in the Democratic Republic of the Congo and other states in the region. Excerpts below also address the role of this initiative in bringing peace to the region.

The full text of Ambassador Prosper's statement is available at *www.state.gov/s/wci/rls/rm/2002/12279.htm*.

We come here today at a defining moment for the Great Lakes region of Africa. An agreement is in the process of being concluded that, if fulfilled, will bring stability to an embattled region. The United States welcomes the understanding reached last week between Congolese and Rwandan envoys in South Africa to help resolve the conflict in the Congo and believes it is an important step forward in the peace process. We are presented with a unique opportunity to strive to secure hope and prosperity for the future.

Today, I announce the expansion of our aggressive and targeted initiative to bring to justice persons indicted for the worst acts of inhumanity. Persons whose presence here in the Congo and elsewhere has been a major source of instability and despair for ordinary citizens. Joining me today in making this announcement is the Congolese Minister of Human Rights, Ntumba Luaba. . . .

The United States is offering up to five million U.S. dollars to anyone who has information that will lead to the arrest and transfer of persons indicted by the International Criminal Tribunal for Rwanda. We are expanding this "Rewards for Justice" campaign to the Congo region as part of the larger effort to bring peace to the Great Lakes region of Africa. Let me be clear. The citizens of this country have suffered greatly. A key to ending the suffering is ending the conflict. A key to ending the conflict is bringing fugitives of the Tribunal to justice. With the recent understanding for peace, the Democratic Republic of the Congo and Rwanda put to paper an agreement to work together to track and dismantle the ex-Far and Interahamwe forces, some committed genocide, all continue to fight. It is our firm belief that with the removal of the key

figures of this group an environment will be created that will see Rwanda withdraw its troops from the Congo, thousands of refugees return to their country, and allow us to address the issues and problems that have plagued this nation east to west for almost a decade. The time now has come to draw the net tightly around war criminals. We are here to help.

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. . . This is a critical moment in history, where there is a choice between leaving these fugitives and other negative elements to fester and foment ongoing conflict or making a strong effort to apprehend them, thus bringing to end the bitter war. Let me stress that we are only seeking those indicted by the UN Tribunal; those who are in positions of leadership. Those not indicted, the foot soldiers, can be disarmed, demobilized and repatriated to Rwanda. These are the fugitives of justice who have been indicted by the UN Tribunal and must be called to account: Augustin Bizimana. Jean-Baptiste Gatete. Augustin Bizimungu. Idelphonse Hategekimana. Augustin Ngirabatware. Idelphonse Nizeyimana. Protais Mpiranya and Callixte Nzabonimana. They are reported to have spent time here in the Democratic Republic of the Congo, as well as next door in Congo-Brazzaville, Gabon, Angola and other states in this region. There are others here and elsewhere who are not pictured here but who we intend to name in the near future.

All these fugitives have been indicted for genocide, crimes against humanity, and violations of the Geneva Conventions and continue to play a destructive role. We are determined to find these fugitives. I am pleased that President Kabila has given his personal assurance to pursue these individuals as an effort to bring peace, justice and improve the lives of his citizens. Their apprehension, however, will require a broad effort on behalf of the international community, the regional governments, and the citizens of the Congo. We urge all governments in the region – the Republic of the Congo, Angola, the Central African Republic, Zambia, Gabon – to join us in this campaign. We ask the citizens of the Congo, anyone and everyone who possesses knowledge as to the whereabouts of those wanted, to come forward to help

their country. In order to truly secure peace, the people of the Congo must do their part. . . .

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b. International Criminal Tribunal for Yugoslavia

(1) Anticipated conclusion of ICTY work

In remarks to a conference of the Organization for Security and Cooperation in Europe conference in Belgrade, Federal Republic of Yugoslavia, on June 15, 2002, Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, U.S. Department of State, addressed the goal of completing all first-instance trials before the International Criminal Tribunal for the Former Yugoslavia ("ICTY") by 2008. Excerpts below also address the importance of increased cooperation with the Tribunal by the regional states and the eventual transfer of responsibility back to Yugoslavia for prosecutions in its domestic courts.

The full text of the speech is available at *www.state.gov/s/wci/rls/rm/2002/11287pf.htm*.

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War Crimes Overview

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[The United States] vision was to work together with all parties to spread and share the responsibility in the global effort to bring to justice those responsible for heinous atrocities and war crimes. We believe that as part of this objective, the Tribunal, the international community and the regional states share a collective interest in reaching a successful conclusion to trials of war crimes by 2008. In this effort, everyone has a part to play and success is only possible if all fulfill their responsibilities. The Tribunal must remain focused in its prosecutions of the political and military leaders most responsible for war crimes. The regional states must

cooperate fully with the Tribunal and accept their responsibility to hold war criminals accountable. And the international community must support the Tribunal and the regional states in their efforts to secure an end to impunity.

Tribunal's Role

The first of these three parties, the ICTY, is on its way to a successful completion of its mandate to bring to justice those most responsible for serious violations of international humanitarian law. The Tribunal is now focusing its investigations and prosecutions primarily on the major political and military leaders and the trials of key figures are now underway. The Tribunal's work has played a crucial role in securing peace and stability in the Balkans region and in reestablishing the standard that crimes against humanity are intolerable. In this effort the Tribunal is a part of a larger goal: being the catalyst to reestablish a culture of accountability in the regional states so that such a Tribunal will never again be needed.

Yugoslavia's Cooperation with the ICTY

As the result of our collective efforts we also see progress within the regional states. Last year 17 persons indicted for war crimes went to The Hague from the Balkan states—more than the previous 2 years combined. Many of these individuals went as the result of their voluntary surrender and many came from Yugoslavia. In the Federal Republic of Yugoslavia, the level of cooperation with The Hague and recognition of international obligations increased.

This year in Yugoslavia that increase continued. We saw further voluntary transfers to The Hague. We saw the passage of a law on cooperation with The Hague Tribunal by the Federal Republic. We saw further action towards full cooperation with the Tribunal with the creation of a National Council on Cooperation with the ICTY. The Council has taken steps to put in place procedures to facilitate the Tribunal's access to documents, suspects and witnesses. Since the passage of the law on cooperation with the ICTY, the government has facilitated additional voluntary transfers

of six indictees and the arrest of Ranko Cesic, who we hope will be transferred to The Hague soon. These actions led Secretary of State Colin L. Powell to determine on May 21 that the Federal Republic of Yugoslavia was cooperating with the ICTY.

Yugoslavia Accepting Responsibility To Adjudicate and International Support

The events of the past year are signs of a truly monumental shift. They show that we are moving in the direction of a return to full state sovereignty for the Federal Republic of Yugoslavia. With this shift comes responsibility. This responsibility demands initiative by Yugoslavia and strong political will. Now, more than ever, we must continue to work cooperatively to coordinate our shared commitment to justice.

The Tribunal's goal of reaching a successful conclusion by 2008 is not an end to justice efforts, but rather a transfer of the primary responsibility for holding war criminals accountable back to Yugoslavia and the regional governments. Yugoslavia and the other regional states are the entities that have the greatest right and most pressing interest to hold abusers accountable. If Yugoslavia is to accept this challenge it must do its part to ensure that investigation, prosecution, and adjudication are undertaken in accordance with a credible, just, impartial, and effective legal system. This will require changes, and, in some cases, difficult political choices—choices that are a part of any true democracy.

Steps for Domestic Adjudication

Therefore, we should strive to build a system that will enable the free and fair prosecution of war crimes cases in Yugoslavia's domestic jurisdictions. This does not, however, require an overhaul of the entire judicial system. Rather, it requires targeted, strategic assistance from the international community to augment existing structures.

It is imperative that these cases be insulated from political influence, that there be sufficient security to protect the witnesses and other trial participants, and that the outcomes are untainted

by corruption. Specialized chambers are one mechanism for achieving this. We should consider creating a specialized approach within the Yugoslav domestic system. Select prosecutors, judges, and other officials should be appointed to sit in these specialized chambers and vetted to ensure they are well-qualified and impartial. International participants can be added to provide expertise as needed.

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We are prepared to begin by assisting the government in the training of practitioners here, with the goal of generating a force multiplier that will propel positive action by subordinate jurists. We also encourage the ICTY to add to this training if requested and assign one person as the point of contact to facilitate the transfer back to the state. The International Criminal Tribunals for the Former Yugoslavia and Rwanda offer a unique and illuminating body of experience and expertise in the adjudication of war crimes that should not be ignored. We envision close collaboration between the ICTY and Yugoslavia to define expectations and understandings for the transfer of cases and for support in meeting these standards. This support would include, where feasible, shared access to case files and evidence databases. We anticipate practitioner to practitioner exchanges between states to build valuable long-term contacts that will strengthen a collective rule of law.

We suggest adding to the overall effort a truth revealing process to address lower-level offenders. It may not be feasible for every perpetrator to be prosecuted in a formal court of law. However, this need not mean that the culpable should escape accountability. A good faith adjudication in a truth and reconciliation commission, or in other locally based mechanisms of justice must point the finger of accusation to ensure that the wrongdoer understands his or her transgressions.

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(2) Cooperation by Federal Republic of Yugoslavia

As noted above, the cooperation of the Federal Republic of Yugoslavia with the International Criminal Tribunal for

Yugoslavia is essential to bringing fugitives to justice. Section 584 of the Foreign Operations, Export Financing and Related Programs Appropriations Act, FY 2002, imposed restrictions on assistance to Serbia after March 31, 2002, unless the Secretary of State certified that the Government of the FRY was taking certain actions with respect to the ICTY, the Dayton Accords, minority rights and rule of law. Pub.L. No. 107–115, 115 Stat. 2118 (2002).

On April 1, 2002, the Department of State deferred that decision, announcing that "[a]lthough Yugoslavia made significant progress with respect to the certification criteria, the Secretary has determined that it would be premature to certify at this point. We have communicated our decision to Belgrade authorities, and have reiterated to them our desire to see further progress on certification issues." *See www.state.gov/r/pa/prs/ps/2002/9104.htm.*

On May 21, 2002, Secretary of State Colin L. Powell made the required certification. The Secretary explained his decision as set forth below.

The full text of the Secretary's remarks is available at *www.state.gov/secretary/rm/2002/10347.htm.*

I [certified] on the basis of new laws that have been passed in Belgrade, voluntary surrenders that have taken place, and indictments that have been issued to those who remain still outside the jurisdiction of the Tribunal. I also noted Kosovar Albanians released and other actions that have been taken on the part of the government in Belgrade that demonstrated to me that cooperation has improved.

There is still more that we will have to do in the months ahead. . . . [W]e are very anxious to work with them to see if Mr. Mladic can be brought to justice.

But I think this is an important step forward in relations between our two countries. We are also interested in improving things economically as well, so we will be taking actions through our OFAC branch at the Treasury Department to begin the process

of unfreezing assets that had been previously frozen, start the thawing process. It takes a while.

c. Sierra Leone

On January 16, 2002, the Government of Sierra Leone and the UN signed an agreement establishing the Special Court, which will have jurisdiction over those individuals who bear the greatest responsibility for violations of international humanitarian law and relevant Sierra Leone law, since November 30, 1996. The United States welcomed the development in a press statement issued by the Department of State, set forth in full below. *See www.state.gov/r/pa/prs/ps/2002/7348.htm.* By the end of 2002 the Prosecutor for the Special Court had begun instituting investigations, and judges had been sworn in.

The United States welcomes the significant events this week, which signal tangible progress in putting an end to the long bloody civil war in Sierra Leone. The United States strongly supports concrete steps toward a just and lasting peace.

We applaud the signature on January 16 by the Government of Sierra Leone and the UN of an agreement establishing the Special Court. The Court will investigate, indict and try those persons, whoever they may be, who bear the greatest responsibility for violations of international humanitarian law and relevant local law in Sierra Leone. The United States has contributed $5 million for its establishment and first year of operation.

On January 17, representatives of the Government of Sierra Leone, the Revolutionary United Front and the United Nations Mission in Sierra Leone (UNAMSIL) held the last of a series of meetings of a Tripartite Commission that had reviewed the status of the country's disarmament program. They agreed that the process was now complete. Since May 2001 more than 45,000 former members of the Revolutionary United Front, pro-government

militias and other fighting groups have turned in their weapons to the UN.

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d. Extraordinary chambers in Cambodia

On December 18, 2002, the UN General Assembly adopted a resolution calling for renewed discussion of establishment of a mechanism to bring war criminals in Cambodia to trial. UN Doc. NO. A/RES/57/228 (2002). Nicholas Rostow, U.S. Counsel, welcomed the resolution, noting that "[t]he United States has been and remains a strong supporter of the establishment of a credible Tribunal to bring to justice those most responsible for atrocities committed during the period of Democratic Kampuchea." The full text of the statement is available at *www.un.int/usa/02_202.htm*.

2. International Criminal Court

a. U.S. decision not to become party to Statue of Rome

(1) Notification of decision to UN

On May 6, 2002, the United States notified the United Nations that it did not intend to become a party to the Statute of Rome establishing the International Criminal Court, UN Doc. No. A/CONF.183/9 (July 17, 1998) ("Rome Statute"), 41 I.L.M. 1014 (2002), and that there were therefore no legal obligations arising from its signature of December 31, 2000. The full text of the letter to UN Secretary General Kofi Annan from John R. Bolton, Under Secretary of State for Arms Control and International Security, is set forth below, available at *www.state.gov/r/pa/prs/ps/2002/9968.htm*.

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that

the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.

(2) Explanation of decision

On the same day, Marc Grossman, Under Secretary of State for Political Affairs, explained the U.S. decision concerning the International Criminal Court in a speech to the Center for Strategic and International Studies, Washington, D.C. In his prepared remarks, set forth below, Under Secretary Grossman explained why the International Criminal Court does not advance principles in which America believes and the need to take this official step to make U.S. objections clear and remove any expectations of U.S. involvement with the court. He also emphasized the U.S. belief that those who commit the most serious crimes of concern to the international community should be punished.

The full text of Under Secretary Grossman's remarks is available at *www.state.gov/p/9949.htm*.

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Here's what America believes in:

- We believe in justice and the promotion of the rule of law.
- We believe those who commit the most serious crimes of concern to the international community should be punished.
- We believe that states, not international institutions are primarily responsible for ensuring justice in the international system.
- We believe that the best way to combat these serious offenses is to build domestic judicial systems, strengthen political will and promote human freedom.

We have concluded that the International Criminal Court does not advance these principles. Here is why:

- We believe the ICC undermines the role of the United Nations Security Council in maintaining international peace and security.
- We believe in checks and balances. The Rome Statute creates a prosecutorial system that is an unchecked power.
- We believe that in order to be bound by a treaty, a state must be party to that treaty. The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens US sovereignty.
- We believe that the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.

President Bush has come to the conclusion that the United States can no longer be a party to this process. In order to make our objections clear, both in principle and philosophy, and so as not to create unwarranted expectations of U.S. involvement in the Court, the President believes that he has no choice but to inform the United Nations, as depository of the treaty, of our intention not to become a party to the Rome Statute of the International Criminal Court. This morning, at the instruction of the President, our mission to the United Nations notified the UN Secretary General in his capacity as the depository for the Rome Statute of the President's decision. These actions are consistent with the Vienna Convention on the Law of Treaties.

The decision to take this rare but not unprecedented act was not arrived at lightly. But after years of working to fix this flawed statute, and having our constructive proposals rebuffed, it is our only alternative.

Historical Perspective

Like many of the nations that gathered in Rome in 1998 for the negotiations to create a permanent International Criminal Court, the United States arrived with the firm belief that those who perpetrate genocide, crimes against humanity, and war crimes must be held accountable—and that horrendous deeds must not go unpunished.

The United States has been a world leader in promoting the rule of law. From our pioneering leadership in the creation of tribunals in Nuremberg, the Far East, and the International Criminal Tribunals for the former Yugoslavia and Rwanda, the United States has been in the forefront of promoting international justice. We believed that a properly created court could be a useful tool in promoting human rights and holding the perpetrators of the worst violations accountable before the world—and perhaps one day such a court will come into being.

A Flawed Outcome

But the International Criminal Court that emerged from the Rome negotiations, and which will begin functioning on July 1 will not effectively advance these worthy goals.

First, we believe the ICC is an institution of unchecked power. In the United States, our system of government is founded on the principle that, in the words of John Adams, "power must never be trusted without a check." Unchecked power, our founders understood, is open to abuse, even with the good intentions of those who establish it.

But in the rush to create a powerful and independent court in Rome, there was a refusal to constrain the Court's powers in any meaningful way. Proposals put forward by the United States to place what we believed were proper checks and balances on the Court were rejected. In the end, despite the best efforts of the U.S. delegation, the final treaty had so many defects that the United States simply could not vote for it.

Take one example: the role of the UN Security Council. Under the UN Charter, the UN Security Council has primary responsibility for maintaining international peace and security. But the Rome Treaty removes this existing system of checks and balances, and places enormous unchecked power in the hands of the ICC prosecutor and judges. The treaty created a self-initiating prosecutor, answerable to no state or institution other than the Court itself.

In Rome, the United States said that placing this kind of unchecked power in the hands of the prosecutor would lead to

controversy, politicized prosecutions, and confusion. Instead, the U.S. argued that the Security Council should maintain its responsibility to check any possible excesses of the ICC prosecutor. Our arguments were rejected; the role of the Security Council was usurped.

Second, the treaty approved in Rome dilutes the authority of the UN Security Council and departs from the system that the framers of the UN Charter envisioned.

The treaty creates an as-yet-to-be defined crime of "aggression," and again empowers the court to decide on this matter and lets the prosecutor investigate and prosecute this undefined crime. This was done despite the fact that the UN Charter empowers only the Security Council to decide when a state has committed an act of aggression. Yet the ICC, free of any oversight from the Security Council, could make this judgment.

Third, the treaty threatens the sovereignty of the United States. The Court, as constituted today, claims the authority to detain and try American citizens, even though our democratically-elected representatives have not agreed to be bound by the treaty. While sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory, the United States has never recognized the right of an international organization to do so absent consent or a UN Security Council mandate.

Fourth, the current structure of the International Criminal Court undermines the democratic rights of our people and could erode the fundamental elements of the United Nations Charter, specifically the right to self defense.

With the ICC prosecutor and judges presuming to sit in judgment of the security decisions of States without their assent, the ICC could have a chilling effect on the willingness of States to project power in defense of their moral and security interests.

This power must sometimes be projected. The principled projection of force by the world's democracies is critical to protecting human rights—to stopping genocide or changing regimes like the Taliban, which abuse their people and promote terror against the world.

Fifth, we believe that by putting U.S. officials, and our men and women in uniform, at risk of politicized prosecutions, the

ICC will complicate U.S. military cooperation with many friends and allies who will now have a treaty obligation to hand over U.S. nationals to the Court—even over U.S. objections.

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 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 President is committed to a robust American engagement in the world to defend freedom and defeat terror; we cannot permit the ICC to disrupt that vital mission.

Our Efforts

The President did not take his decision lightly.

After the United States voted against the treaty in Rome, the U.S. remained committed and engaged—working for two years to help shape the court and to seek the necessary safeguards to prevent a politicization of the process. U.S. officials negotiated to address many of the concerns we saw in hopes of salvaging the treaty. The U.S. brought international law experts to the preparatory commissions and took a leadership role in drafting the elements of crimes and the procedures for the operation of the court.

While we were able to make some improvements during our active participation in the UN Preparatory Commission meetings in New York, we were ultimately unable to obtain the remedies necessary to overcome our fundamental concerns.

On December 31, 2000, the previous administration signed the Rome Treaty. In signing President Clinton reiterated "our concerns about the significant flaws in the treaty," but hoped the U.S. signature would provide us influence in the future and assist our effort to fix this treaty. Unfortunately, this did not prove to be the case.

On April 11, 2002, the ICC was ratified by enough countries to bring it into force on July 1 of this year. Now we find ourselves

at the end of the process. Today, the treaty contains the same significant flaws President Clinton highlighted.

Our Philosophy

While we oppose the ICC we share a common goal with its supporters—the promotion of the rule of law. Our differences are in approach and philosophy. In order for the rule of law to have true meaning, societies must accept their responsibilities and be able to direct their future and come to terms with their past. An unchecked international body should not be able to interfere in this delicate process.

For example: When a society makes the transition from oppression to democracy, their new government must face their collective past. The state should be allowed to choose the method. The government should decide whether to prosecute or seek national reconciliation. This decision should not be made by the ICC.

If the state chooses as a result of a democratic and legal process not to prosecute fully, and instead to grant conditional amnesty, as was done in difficult case of South Africa, this democratic decision should be respected.

Whenever a state accepts the challenges and responsibilities associated with enforcing the rule of law, the rule of law is strengthened and a barrier to impunity is erected. It is this barrier that will create the lasting goals the ICC seeks to attain. This responsibility should not be taken away from states.

International practice should promote domestic accountability and encourage sovereign states to seek reconciliation where feasible.

The existence of credible domestic legal systems is vital to ensuring conditions do not deteriorate to the point that the international community is required to intercede.

In situations where violations are grave and the political will of the sovereign state is weak, we should work, using any influence we have, to strengthen that will. In situations where violations are so grave as to amount to a breach of international peace

and security, and the political will to address these violations is non-existent, the international community may, and if necessary should, intercede through the UN Security Council as we did in Bosnia and Rwanda.

Unfortunately, the current framework of the Rome treaty threatens these basic principles.

We Will Continue To Lead

Notwithstanding our disagreements with the Rome Treaty, the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court.

So, despite this difference, we must work together to promote real justice after July 1, when the Rome Statute enters into force.

The existence of a functioning ICC will not cause the United States to retreat from its leadership role in the promotion of international justice and the rule of law.

The United States will:

- Work together with countries to avoid any disruptions caused by the Treaty, particularly those complications in US military cooperation with friends and allies that are parties to the treaty.
- Continue our longstanding role as an advocate for the principle that there must be accountability for war crimes and other serious violations of international humanitarian law.
- Continue to play a leadership role to right these wrongs.
- The armed forces of the United States will obey the law of war, while our international policies are and will remain completely consistent with these norms.
- Continue to discipline our own when appropriate.
- We will remain committed to promoting the rule of law and helping to bring violators of humanitarian law to justice, wherever the violations may occur.

- We will support politically, financially, technically, and logistically any post-conflict state that seeks to credibly pursue domestic humanitarian law.
- We will support creative ad-hoc mechanisms such as the hybrid process in Sierra Leone—where there is a division of labor between the sovereign state and the international community—as well as alternative justice mechanisms such as truth and reconciliation commissions.
- We will work with Congress to obtain the necessary resources to support this global effort.
- We will seek to mobilize the private sector to see how and where they can contribute.
- We will seek to create a pool of experienced judges and prosecutors who would be willing to work on these projects on short-notice.
- We will take steps to ensure that gaps in United States' law do not allow persons wanted or indicted for genocide, war crimes, or crimes against humanity to seek safe haven on our soil in hopes of evading justice.

And when violations occur that are so grave and that they breach international peace and security, the United States will use its position in the UN Security Council to act in support of justice.

We believe that there is common ground, and ask those nations who have decided to join the Rome Treaty to meet us there. Encouraging states to come to face the past while moving into the future is a goal that no one can dispute. Enhancing the capacity of domestic judiciaries is an aim to which we can all agree. The United States believes that justice would be best served in creating an environment that will have a lasting and beneficial impact on all nations across the globe. Empowering states to address these challenges will lead us to a more just and peaceful world. Because, in the end, the best way to prevent genocide, crimes against humanity, and war crimes is through the spread of democracy, transparency and rule of law. Nations with accountable, democratic governments do not abuse their own people or wage wars of conquest and terror. A world of self-governing democracies is our best hope for a world without inhumanity.

b. UN Security Council Resolution 1422

By April 2002 over sixty countries had notified the depositary that they had completed ratification procedures to become parties to the Rome Statute. Under the terms of Article 126, the Rome Statute therefore entered into force on July 1, 2002. In anticipation of this event, the United States, as a non-party, undertook to protect U.S. troops involved in peacekeeping forces from exposure to the claimed jurisdiction of the International Criminal Court.

(1) U.S. efforts to obtain protection

Following several unsuccessful efforts in the intervening months to have its concerns addressed by the UN Security Council, on June 30, 2002, the United States vetoed a resolution in the Council concerning the renewal of the mandate for the UN peacekeeping mission in Bosnia and Herzegovina. Excerpts below from the statement by John D. Negroponte, U.S. Permanent Representative to the UN, affirmed the continuing U.S. commitment to peace and stability in the Balkans and explained the relationship between U.S. participation in peacekeeping activities and the International Criminal Court.

The full text of Ambassador Negroponte's statement is available at *www.un.int/usa/02_087.htm*.

The longstanding commitment of the United States to peace and stability in the Balkans is beyond question. We have also been clear and consistent about our concerns on the ICC, in particular the need to ensure our national jurisdiction over our personnel and officials involved in UN peacekeeping and coalition-of-the-willing operations.

As you are well aware, this is not the first time we have raised this issue in the Council. I explained these concerns when we dealt with UNMISET [United Nations Mission of Support in East

Timor] in May. The United States voted in favor of the East Timor resolution with the expectation that the Council would address our concerns before the ICC came into effect July 1. In East Timor only three U.S. soldiers participate in the UN peacekeeping mission; we intend to withdraw them absent a solution to the ICC issue.

It is with great regret that the United States finds itself on the eve of that date, despite our best efforts, without a solution.

The United States has contributed – and will continue to contribute – to maintaining peace and security in the Balkans and around the globe. . . .

Some contend that our concerns are unwarranted. With our global responsibilities, we are and will remain a special target and cannot have our decisions second-guessed by a court whose jurisdiction we do not recognize.

With the court coming into being, this problem must be resolved—but in a way that takes account of two hard facts: the United States wants to participate in international peacekeeping; but the United States, a major guarantor of peace and security around the globe and a founding member of the United Nations, does not and will not accept the jurisdiction of the ICC over the peacekeepers that it contributes to UN-established and-authorized operations.

* * * *

It strikes us as more than perplexing that others who are parties to the ICC can use the provision of the treaty to exempt their forces for an extended period from the purview of the court for war crimes and then suggest that our attempt to use other provisions of the treaty similarly to provide protection for our forces either violates their treaty obligations or does unacceptable damage to the spirit of the treaty.

The United States will vote against this resolution with great reluctance. This decision is not directed at the people of Bosnia. We will stand by them and by our commitment to peace and stability in the Balkans. The fact that we are vetoing this resolution in the face of that commitment, however, is an indication of just how serious our concerns remain about the risks to our peacekeepers.

On July 10, 2002, Ambassador Negroponte, again addressed the Security Council on the U.S. commitment to peacekeeping and the U.S. proposed solution to issues concerning the ICC.

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

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Mr. President, as our record demonstrates, the United States believes in justice and the rule of law, and in accountability for war crimes, crimes against humanity, and genocide. We accept the responsibility to investigate and prosecute our own citizens for such offences should they occur. And we do not shirk from public and private protest—here in New York, in the Human Rights Commission in Geneva, or wherever our voice can be heard—whenever and wherever such outrages are committed.

* * * *

In Bosnia, the U.S. has more than 2,000 troops and nearly 50 civilian police. The senior UN official is an American citizen, on loan from my government. With such a record, it is clear that our veto of the UNMIBH [United Nations Mission in Bosnia Herzegovina] resolution did not reflect rejection of peacekeeping in Bosnia. But it did reflect our frustration at our inability to convince our colleagues on the Security Council to take seriously our concerns about the legal exposure of our peacekeepers under the Rome Statute.

Peacekeeping is one of the hardest jobs in the world. While we fully expect our peacekeepers to act in accordance with established mandates and in a lawful manner, peacekeepers can and do find themselves in difficult, ambiguous situations. Peacekeepers from states that are not party to the Rome Statute should not face, in addition to the dangers and hardships of deployment, additional, unnecessary legal jeopardy. If we want troop contributors to offer qualified military units to peacekeeping operations, it is in the interest of all UN Member States to ensure that they are not exposed to unnecessary additional

risks. This principle has been acknowledged over decades in UN Status of Mission Agreements and by parallel agreements such as in the Dayton Accords and the Military Technical Agreement for ISAF [International Security Assistance Force for Afghanistan].

We should be very clear: the legal position of peacekeepers and the states contributing them has been an issue throughout the history of peacekeeping, and has been an important consideration for the governments that must decide whether to contribute their citizens to peacekeeping operations, or to help out in unexpected crisis or emergency situations, as the U.S. frequently is asked to do.

The Secretary-General noted that peacekeepers have not been prosecuted for such crimes in the past. We agree. And this is an additional reason why we do not believe the ability of the ICC to pursue peacekeepers is central to its functions.

* * * *

Deferral of investigations and prosecutions, in keeping with the Rome Statute, cannot undermine the role the ICC plays on the world stage. Failure to address concerns about placing peacekeepers in legal jeopardy before the ICC, however, can impede the provision of peacekeepers to the UN. It certainly will affect our ability to contribute peacekeepers.

Mr. President, although we do not recognize the jurisdiction of the ICC and do not intend to become party to the Rome Statute, we do not question the good intentions of its architects. We respect the obligations of those states that have ratified the Rome Statute. Indeed, in the proposals we have put forward before this Council, we have sought to work within the provisions of that Statute. We hope that other states, in turn, will respect our concerns about our peacekeepers.

Our latest proposal uses Article 16 of the Rome Statute, as we were urged to do by other Council members, to address our concerns about the implications of the Rome Statute for nations that are not party to it, but which want to continue to contribute peacekeepers to UN missions. We respectfully disagree with analyses that say our approach is inconsistent with the Rome Statute.

Article 16 contemplates that the Security Council may make a renewable request to the ICC not to commence or proceed with investigations or prosecutions for a 12-month period on the basis of a Chapter VII resolution. We believe it is consistent both with the terms of Article 16 and with the primary responsibility of the Security Council for maintaining international peace and security for the Council to adopt such a resolution with regard to operations it authorizes or establishes. And for the Council to decide to renew such requests.

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(2) Adoption of UN Security Council Resolution 1422

On July 12, 2002, the United Nations adopted Resolution 1422, noting, among other things that not all states are parties to the Rome Statute and that it was "in the interests of international peace and security to facilitate UN Member States' ability to contribute to operations established or authorized by the United Nations Security Council." The operative paragraphs of Resolution 1422 provided that the Security Council, acting under Chapter VII of the Charter of the United Nations:

> 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 twelve-month period starting 1 July 2002 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 withparagraph 1 and with their international obligations;
> 4. *Decides* to remain seized of the matter.

Ambassador Negroponte's statement at the time UNSCR 1422 was adopted is set forth below, available at *www.un.int/usa/02_098.htm*.

This resolution represents the culmination of weeks of work by my government and many of the other governments represented here. Some members of this Council are members of the International Criminal Court while others, including the United States, are not and never will be. The United States has therefore sought a resolution that would allow those in the Court to meet their obligations to it, while it protected those of us who reject the jurisdiction of that institution. At risk were the peacekeeping activities of the United Nations, in the first instance in Bosnia but ultimately throughout the globe. The United States is therefore very pleased that we have successfully reached agreement. It offers us a degree of protection for the coming year.

For the United States, this resolution is a first step. The President of the United States is determined to protect our citizens —soldiers and civilians, peacekeepers and officials—from the International Criminal Court. We are especially concerned that Americans sent overseas as soldiers, risking their lives to keep the peace or to protect us all from terrorism and other threats, be themselves protected from unjust or politically motivated charges. Should the ICC eventually seek to detain any American, the United States would regard this as illegitimate—and it would have serious consequences. No nation should underestimate our commitment to protect our citizens.

Our government was founded by Americans to protect their freedom. Our Declaration of Independence states that, and I quote, "governments are instituted among men, deriving their just powers from the consent of the . . . governed," . . . in order to secure their rights. We have built up in our two centuries of constitutional history a dense web of restraints on government, and of guarantees and protections for our citizens. The power of the government is very great, but those restraints are equally powerful. The history of American law is very largely the history of that balance between the power of the government and the rights of the people.

We will not permit that balance to be overturned by the imposition on our citizens of a novel legal system they have never accepted or approved, and which their government has explicitly rejected. We will never permit Americans to be jailed because judges of the ICC, chosen without the participation of those over whom they claim jurisdiction, so decide. We cannot allow that Americans who have been acquitted of accusations against them in the United States shall be subject to prosecution for the same acts if an ICC prosecutor or judge concludes that the American legal proceedings were somehow inadequate. We know that prosecutors who are responsible to no one constitute a danger, and we will not expose our citizens to such a danger. We cannot accept a structure that may transform the political criticism of America's world role into the basis for criminal trials of Americans who have put their lives on the line for freedom.

The American system of justice can be trusted to punish crimes, including war crimes or crimes against humanity, committed by an American—and we pledge to do so. But we do not believe the International Criminal Court contains sufficient safeguards to protect our nationals, and therefore we can never in good conscience permit Americans to become subject to its authority.

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. Thus does an American judge have the legal and moral right, founded in our Constitution and in democratic procedures, to jail an American. But the 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 does not oppose special tribunals to prosecute international offenses, and indeed has been a key supporter of them. But we believe that these existing mechanisms, within the framework of the UN Charter and the Security Council and already accepted by the international community, are adequate.

Once again I thank the members of the Security Council for their hard work in reaching a successful agreement today. . . . This resolution respects those who have decided to submit to the International Criminal Court, and for one year it protects those of

us who have not. We will use the coming year to find the additional protections we need, using bilateral agreements expressly contemplated in Article 98 of the Rome Statute. We will seek your cooperation, that is to say, the cooperation of the Council in achieving these agreements, so as to provide the protection that our understanding of the rights and freedoms of our citizens requires. . . .

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In a letter of July 16, 2002, Secretary of State Colin L. Powell explained the significance of the recently obtained Resolution 1422 in response to a July 10 letter from U.S. Senators Jesse Helms, John Warner, Zell Miller, and George Allen, as set forth in the excerpts below.

The full text of Secretary Powell's letter is available at *www.state.gov/s/l/c8183.htm.*

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On July 12, the Security Council unanimously adopted resolution 1422 after weeks of heated debate. The resolution, under Chapter VII of the UN Charter, speaks directly to both the ICC and to UN member states. It contains a request, binding under the Rome Statute which established the ICC, that the ICC not commence or proceed with any investigation or prosecution of our personnel and officials for a year. It also requires, under the Chapter VII authority of the Security Council, that no UN member state take any action inconsistent with that request.

Resolution 1422 establishes the precedent of Security Council deferral of ICC action against non-parties to the Rome Statute arising from their involvement in any UN peacekeeping operation. In the case of UN-authorized deployments not under UN operational command, like SFOR [Stabilisation Force] in Bosnia and KFOR [Kosovo Force] in Kosovo, the resolution protects any U.S. persons serving anywhere in the non-UN chain of command, including SACEUR [Supreme Allied Commander Europe] and any current or former officials who may be involved in "acts or omissions relating to UN established or authorized operations."

The resolution explicitly states the Council's intention to renew this deferral next year. Although we had hoped for an automatic renewal, Ambassador Negroponte already has expressed our intention to seek renewal in a year's time.

Resolution 1422, however, is only a first step. We are determined to protect all our servicemen and women, not just those involved in UN peacekeeping.

We are seeking a global network of bilateral agreements under which Americans would not be surrendered to the ICC without the prior consent of the United States Government. Such agreements are consistent with Article 98 of the Rome Statute. These so-called "article 98" agreements would cover all our military personnel, whether stationed in or transiting through other countries party to such agreements, during their assignments and later on, while traveling as civilians or after retirement.

I already have sent instructions to our embassies around the world to begin these negotiations, which will take time. Security Council resolution 1422's one-year deferral of ICC action gives us the time necessary to negotiate with as broad a group of countries as possible.

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c. *Bilateral agreements under Article 98 of the Rome Treaty*

During the debate over Resolution 1422, several U.S. allies had suggested to the United States privately that its concerns for its peacekeepers could be resolved via article 98(2) of the Rome Statute. As indicated in statements by Ambassador Negroponte and Secretary of State Powell, *supra*, the United States initiated negotiations with a number of governments to enter into agreements contemplated by article 98, which 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."

The provision is not limited to agreements predating the Rome Statute and accommodates agreements covering persons of a state generally, without regard to whether they possess a particular status or capacity.

A press statement by the U.S. Department of State, August 1, 2002, announcing the signature of the first Article 98 agreement, between the United States and Romania, explained:

> These agreements are consistent with the Rome Statute of the International Criminal Court and will help to provide the safeguards we seek to protect Americans from surrender to the ICC. While we respect the decision of those countries who have chosen to join the International Criminal Court, we hope that countries will respect the decision of the United States not to join, and will follow Romania's lead in working with us on practical means of addressing our serious concerns about the ICC.

The full text of the press statement is available at *http://www.state.gov/r/pa/prs/ps/2002/12393pf.htm*.

The European Union, which is not itself a party to the Rome Statute, published non-binding "guiding principles" for its members on September 30, 2002, asserting that, *inter alia*, the scope of coverage sought by the United States should take into account that some persons enjoy state or diplomatic immunity under international law, and should cover only those persons present on the territory of a requested state because they have been sent by a sending state.

At the end of 2002, the United States had signed seventeen Article 98 agreements. Negotiations with EU member countries continued although no EU country had signed an agreement at the end of the year.

On December 20, 2002, the Republic of Uzbekistan became the first country to notify the United States that it

had completed its domestic procedures to allow an Article 98 agreement to enter into force. The text of the Agreement between the Government of the United States of America and the Government of the Republic of Uzbekistan Regarding the Surrender of Persons to the International Criminal Court, signed September 18, 2002, in Washington, D.C., is set forth below in full.

The Government of the United States of America and the Government of the Republic of Uzbekistan. hereinafter "the Parties,"

Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,

Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17. 1998, by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,

Considering that the Parties have each expressed their intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by their officials, employees, military personnel or other nationals, and

Bearing in mind Article 98 of the Rome Statute,

Hereby agree as follows:

1. For purposes of this agreement, "persons" are current or former Government officials. employees (including contractors), or military personnel or nationals of one Party.
2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,
   a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or
   b) be surrendered or transferred by any means to any other entity or third country. or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.

3. When the United States extradites, surrenders, or otherwise transfers a person of the Republic of Uzbekistan to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of the Republic of Uzbekistan.
4. When the Government of the Republic of Uzbekistan extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of the Republic of Uzbekistan will not agree to the surrender or transfer of that person to the International Criminal Court by a third country. absent the expressed consent of the Government of the United States.
5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

d. Congressional action

(1) American Servicemembers' Protection Act

On August 2, 2002, President George W. Bush signed into law the American Servicemembers' Protection Act of 2002, Pub. L. No. 107–206, Title II, Sec. 2001, 116 Stat at 899 ("the Act"). The Act prohibits cooperation with the International Criminal Court in matters of discovery, extradition, or other support (§ 2004) and the direct or indirect transfer of classified national security information and law enforcement information to the ICC (§ 2006). Section 2015 provides, however, that the Act does not prohibit the United States from providing assistance to international efforts to bring to justice foreign nationals accused of genocide, war crimes, or

crimes against humanity. Under § 2005, members of the armed forces of the United States may not participate in any peacekeeping or peace-enforcement operation unless the President certifies that such members are able to participate without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court or that U.S. national interests justify participation. Section 2007 provides that, one year after the date on which the Rome Statute entered into force, no U.S. military assistance may be provided to the government of a country that is a party to the ICC. Section 2007 specifically exempts the governments of NATO members, major non-NATO allies, and Taiwan. It further provides for a Presidential waiver on the basis of U.S. national interest or if 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. Section 2008 authorizes the President to use all means necessary and appropriate to bring about the release of specified persons being detained or imprisoned by, on behalf of, or at the request of the ICC. The section states that it does not authorize bribes and other inducements. Section 2009 of the Act also requires reports with respect to each military alliance to which the United States is party on issues relating to the jurisdiction of the ICC.

Section 2011 of the Act provides that sections 2004 and 2006 shall not apply to actions directed by the President on a case-by-case basis in the exercise of the President's authority under the U.S. Constitution.

Key provisions of the Act are set forth below.

Sec. 2004. Prohibition on Cooperation with the International Criminal Court.

(a) Application.—The provisions of this section—
  (1) apply only to cooperation with the International Criminal Court and shall not apply to cooperation with an ad hoc

international criminal tribunal established by the United Nations Security Council before or after the date of the enactment of this Act to investigate and prosecute war crimes committed in a specific country or during a specific conflict; and

(2) shall not prohibit—

(A) any action permitted under section 2008; or

(B) communication by the United States of its policy with respect to a matter.

(b) Prohibition on Responding to Requests for Cooperation.—Notwithstanding section 1782 of title 28, United States Code, or any other provision of law, no United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute.

(c) Prohibition on Transmittal of Letters Rogatory From the International Criminal Court.—Notwithstanding section 1781 of title 28, United States Code, or any other provision of law, no agency of the United States Government may transmit for execution any letter rogatory issued, or other request for cooperation made, by the International Criminal Court to the tribunal, officer, or agency in the United States to whom it is addressed.

(d) Prohibition on Extradition to the International Criminal Court.—Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government may extradite any person from the United States to the International Criminal Court, nor support the transfer of any United States citizen or permanent resident alien to the International Criminal Court.

(e) Prohibition on Provision of Support to the International Criminal Court.—Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government, including any court, may provide support to the International Criminal Court.

(f) Prohibition on Use of Appropriated Funds To Assist the International Criminal Court.—Notwithstanding any other

provision of law, no funds appropriated under any provision of law may be used for the purpose of assisting the investigation, arrest, detention, extradition, or prosecution of any United States citizen or permanent resident alien by the International Criminal Court.

(g) Restriction on Assistance Pursuant to Mutual Legal Assistance Treaties.—The United States shall exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance in criminal matters, multilateral conventions with legal assistance provisions, and extradition treaties, to which the United States is a party, and in connection with the execution or issuance of any letter rogatory, to prevent the transfer to, or other use by, the International Criminal Court of any assistance provided by the United States under such treaties and letters rogatory.

(h) Prohibition on Investigative Activities of Agents.—No agent of the International Criminal Court may conduct, in the United States or any territory subject to the jurisdiction of the United States, any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the International Criminal Court.

Sec. 2005. Restriction on United States Participation in Certain United Nations Peacekeeping Operations.

(a) Policy.—Effective beginning on the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, the President should use the voice and vote of the United States in the United Nations Security Council to ensure that each resolution of the Security Council authorizing any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations permanently exempts, at a minimum, members of the Armed Forces of the United States participating in such operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by such personnel in connection with the operation.

(b) Restriction.—Members of the Armed Forces of the United States may not participate in any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations, the creation of which is authorized by the United Nations Security Council on or after the date that the Rome Statute enters into effect pursuant to Article 126 of the Rome Statute, unless the President has submitted to the appropriate congressional committees a certification described in subsection (c) with respect to such operation.

(c) Certification.—The certification referred to in subsection (b) is a certification by the President that—

(1) members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation 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 permanently exempted, at a minimum, members of the Armed Forces of the United States participating in the operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by them in connection with the operation;

(2) members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because each country in which members of the Armed Forces of the United States participating in the operation will be present either is not a party to the International Criminal Court and has not invoked the jurisdiction of the International Criminal Court pursuant to Article 12 of the Rome Statute, or has entered into an agreement in accordance with Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against members of the Armed Forces of the United States present in that country; or

(3) the national interests of the United States justify participation by members of the Armed Forces of the United States in the peacekeeping or peace enforcement operation.

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Sec. 2008. Authority to Free Members of the Armed Forces of the United States and Certain Other Persons Detained or Imprisoned by or on Behalf of the International Criminal Court.

(a) Authority.—The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.

(b) Persons Authorized To Be Freed.—The authority of subsection (a) shall extend to the following persons:

(1) Covered United States persons.

(2) Covered allied persons.

(3) Individuals detained or imprisoned for official actions taken while the individual was a covered United States person or a covered allied person, and in the case of a covered allied person, upon the request of such government.

(c) Authorization of Legal Assistance.—When any person described in subsection (b) is arrested, detained, investigated, prosecuted, or imprisoned by, on behalf of, or at the request of the International Criminal Court, the President is authorized to direct any agency of the United States Government to provide—

(1) legal representation and other legal assistance to that person (including, in the case of a person entitled to assistance under section 1037 of title 10, United States Code, representation and other assistance in the manner provided in that section);

(2) exculpatory evidence on behalf of that person; and

(3) defense of the interests of the United States through appearance before the International Criminal Court pursuant to

Article 18 or 19 of the Rome Statute, or before the courts or tribunals of any country.

(d) Bribes and Other Inducements Not Authorized.—This section does not authorize the payment of bribes or the provision of other such incentives to induce the release of a person described in subsection (b).

* * * *

Sec. 2015. Assistance to International Efforts.

Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

(2) Understandings to treaties

In granting advice and consent to ratification of the extradition and mutual legal assistance treaties discussed in A.1. *supra*, the Senate included in five of the resolutions of ratification an understanding relating to cooperation with the International Criminal Court. The understandings were included in the instruments of ratification signed by President Bush.

The understanding included in each of the mutual legal assistance treaties provided:

> Prohibition on Assistance to the International Criminal Court.—The United States shall exercise its rights to limit the use of assistance that it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court unless the treaty establishing the Court has entered into force for the United States by and with the advice of the Senate in accordance with Article II, Section 2 of the United States Constitution, or unless the President has waived

> any applicable prohibition on provision of such assistance in accordance with applicable United States law.

See, e.g., 148 CONG.REC. S11,058–S11,059 (November 14, 2002).

The following understanding was included in the Resolution of Ratification for the extradition treaty with Peru:

> Prohibition of Extradition to the International Criminal Court.—The United States understands that the protections contained in Article XIII concerning the Rule of Speciality would preclude the resurrender of any person extradited to the Republic of Peru from the United States to the International Criminal Court, unless the United States consents to such resurrender; and the United States shall not consent to any such resurrender unless the Statute establishing that Court has entered into force for the United States by and with the advice and consent of the Senate in accordance with Article II, section 2 of the United States Constitution.

148 CONG. REC. S11,057–11,058 (November 14, 2002).

The Senate Foreign Relations Committee determined that it was unnecessary to include such an understanding to the resolution for the extradition treaty with Lithuania because the treaty itself specifically barred such retransfer. S. Exec. Rpt. 107–13 at 3.

Cross Reference

International cooperation in disrupting terrorist financing, **Chapter 16.1.e.**
References to ICC in human rights resolutions, **Chapter 6.G.2.**
Terrorism and human rights, **Chapter 6.J.**
Exception to Foreign Sovereign Immunities Act for certain terrorist-related claims, **Chapter 10.A.6.**
Release of documents responsive to MLAT request, **Chapter 6.A.3.**

Chapter 4

Treaty Affairs

A. CAPACITY TO MAKE

In anticipation of East Timor gaining independence on May 20, 2002, the Peace Corps was authorized to negotiate an anticipatory agreement with representatives of the expected government of the Democratic Republic of East Timor in order to begin operations in East Timor as soon after independence as possible. The agreement was negotiated with representatives of the UN Second Transitional Government in East Timor with the understanding that it could be concluded and enter into force only upon the independence of the country on May 20, 2002. The agreement was signed and entered into force on May 24, 2002.

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

B. CONCLUSION, ENTRY INTO FORCE, RESERVATIONS, APPLICATION, AND TERMINATION

1. Choice of Form: International Arms Control Agreements

A memorandum of February 27, 2002, from William H. Taft, IV, Legal Adviser for the Department of State, to John B. Bellinger, III, Senior Associate Counsel to the President and Legal Adviser of the National Security Council, provided Legal Adviser Taft's views on the power to enter into international agreements under the U.S. Constitution. Excerpts below

address the distinctions in U.S. practice between treaties requiring U.S. Senate advice and consent and international agreements brought into force on a different constitutional basis, and the applicability of these distinctions in the treatment of arms control agreements, which have generally been concluded as treaties.

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

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I. GENERAL RULE: TREATY VS. OTHER INTERNATIONAL AGREEMENT

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Constitutional Requirements

There are two procedures under the Constitution through which the United States becomes a party to international agreements. Those procedures and the constitutional parameters of each are:

Treaties

International agreements (regardless of their title, designation, or form) whose entry into force with respect to the United States takes places only after the Senate has given its advice and consent are "treaties." The President, with the advice and consent of two-thirds of the Senators present, may enter into an international agreement on any subject of concern in foreign relations, so long as the agreement does not contravene the United States Constitution; and

International agreements other than treaties

International Agreements brought into force with respect to the United States on a constitutional basis other than with the advice and consent of the Senate are "international agreements other

than treaties." (The term "executive agreement" is generally reserved for agreement made solely on the basis of the constitutional authority of the President.) There are three constitutional bases for international agreements other than treaties as set forth below. An international agreement may be concluded pursuant to one or more of these constitutional bases:

Agreements pursuant to treaty

The President may conclude an international agreement pursuant to a treaty brought into force with the advice and consent of the Senate whenever the provisions of the treaty constitute authorization for the agreement by the Executive without subsequent action by the Congress;

Agreements pursuant to legislation

The President may conclude an international agreement on the basis of existing legislation or subject to legislation to be enacted by the Congress; and

Agreement pursuant to the constitutional authority of the President

The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority. The constitutional sources of authority for the President to conclude international agreements include:

The President's authority as Chief Executive to represent the nation in foreign affairs;
The President's authority to receive ambassadors and other public ministers;
The President's authority as "Commander-in-Chief"; and
The President's authority to "take care that the laws be faithfully executed."

II. CONSIDERATIONS FOR SELECTING AMONG CONSTITUTIONALLY AUTHORIZED PROCEDURES

In determining what procedures should be followed for any particular international agreement, consideration is given to the following factors, together with those in the preceding section of this memorandum:

The extent to which the agreement involves commitments or risks affecting the nation as a whole;
Whether the agreement is intended to affect State laws;
Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
Past U.S. practice as to similar agreements;
The preference of the Congress as to a particular type of agreement;
The degree of formality desired for an agreement;
The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
The general international practice as to similar agreements.

In determining whether an international agreement should be brought into force as a treaty or as an international agreement other than a treaty, care is always taken to avoid any invasion or compromise of the constitutional powers of the President, the Senate, or the Congress as a whole.

III. APPLICATION OF PRINCIPLES IN SECTION I AND II TO ARMS CONTROL AGREEMENTS

Form

Treaties

International agreements of the United States in the arms control area have generally been concluded as treaties.

International agreements other than treaties
Agreements pursuant to treaty

A number of Arms Control Treaties provide mechanisms under which bodies established by the treaty are authorized to make limited changes to parts of the treaty. For example, Section XI of the Protocol to the Treaty Between the United States and the USSR on the limitation of underground nuclear weapons tests provides that the Parties to the Treaty may change certain provisions of the Protocol by agreement in the Bilateral Consultative Commission established by that Section. However, the Protocol states that such agreed changes shall not be considered amendments to the Treaty or this Protocol. Although treaties such as the Panama Canal Treaty authorize the conclusion of new agreements, there does not appear to be a similar provision in any arms control agreement that would authorize a major new agreement in that field.

Agreements pursuant to legislation

The Interim Agreement between the United States and the [former] USSR on Certain Measures with Respect to Limitation of Strategic Offensive Arms and a related Protocol signed at Moscow on May 26, 1972 were concluded pursuant to a Joint Resolution that authorized the President to accept the Agreement and Protocol.

Agreements pursuant to the constitutional authority of the President

Armistice with Italy signed at Fairfield Camp, Sicily, September 23, 1943 was concluded on the basis of the President's commander-chief power.

Selection among constitutionally authorized procedures

Extent of commitments

The agreement under consideration involves commitments or risks affecting the nation as a whole. This criterion argues for a treaty or a legislatively approved international agreement.

Intention to affect State laws

If there are provisions in the agreement under consideration that would affect State laws, the treaty form would be preferable.

Whether the agreement can be given effect without enactment of subsequent legislation by the Congress

It is unclear whether, if the arms control agreement being contemplated were to be a treaty, there would be a need for enactment of subsequent legislation by the Congress.

Past U.S. practice as to similar agreements

Nearly all arms control agreements of the United States have been concluded as treaties.

The preference of the Congress as to a particular type of agreement

Section 34 of the Arms Control and Disarmament Act provides that no action obligating the United States to reduce its armaments may be taken except pursuant to the treaty-making power or unless authorized by further affirmative legislation by Congress. The Senate prefers that arms control agreements be concluded as treaties and has on a number of occasions expressed this preference in resolutions of advice and consent to arms control treaties.

The degree of formality desired for an agreement

Although the Document agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe of November 19, 1990 ("the Flank Agreement") is less formal than most arms control agreements, the United States handled it as an advice and consent treaty. Outside the arms control area the formality criterion was applied with respect to the 1990 Treaty on the Final Settlement with Respect to Germany. A State Department spokesman had stated that the Department was leaning to the conclusion of the agreement as an executive agreement. The Senate Majority Leader and the Chairman of the Senate Foreign Relations Committee

stated that because of its importance it should be a treaty. In light of those views, the President sent it for advice and consent.

The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement

In the arms control area, the classic example of the short term, urgent agreement is the interim armistice agreement. The Military Armistice in Korea and the Temporary Supplementary Agreement of July 27, 1953 appear to have been based on the President's commander-in-chief powers. This criterion would favor the treaty form for the arms control agreement under consideration.

The general international practice as to similar agreements

The general international practice is to conclude arms control agreements as treaties.

2. Ratification of Protocols Where United States Not Party to Underlying Convention

As discussed in chapter 6.C., the United States became party in 2002 to two optional protocols to the Convention on the Rights of the Child although it has signed but is not party to the Convention itself. In answer to a question for the record from Senator Joseph R. Biden, Jr., during consideration of the protocols by the Senate Foreign Relations Committee, the Department of State explained the legal basis for that action, as set forth below. S. Exec. Rpt. No. 107–4 at 80. *See also Digest 2000* at 358, 361. Excerpts provided in Chapter 6.C. include the proposed understanding referred to in this exchange, which was, in turn, included in the instruments of ratification signed by President George W. Bush

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Question 6. Please explain why, as a matter of law, the United States may become a party to the Protocols even though it is not a party to the underlying Convention on the Rights of the Child?
Answer. As discussed in the Executive Branch's submittal to the Senate, Article 9 of the Children in Armed Conflict Protocol is subject to ratification or open for accession by any State, i.e., it is not limited to parties to the Convention on the Rights of the Child. Thus, the United States is eligible to become a party to the Children in Armed Conflict Protocol even though it has not ratified the Convention.

Similarly, Article 13 of the Sale of Children Protocol is subject to ratification or open for accession by any State that is a party to the Convention on the Rights of the Child, or has signed it. Thus, the United States is eligible to become a party to the Protocol because it signed the Convention in February of 1995.

To reflect the fact that both Protocols are independent international agreements, the following understanding has been recommended to accompany the U.S. instrument of ratification for each Protocol:

> "The United States understands that the Protocol constitutes an independent multilateral treaty, and that the United States does not assume any obligations under the Convention on the Rights of the Child by becoming a party to the Protocol."

* * * *

The Office of Treaty Affairs, Office of the Legal Adviser, U.S. Department of State, provided other examples of U.S. ratification of protocols in cases where the United States was not a party to the underlying treaty, set forth below.

(a) **Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships (MARPOL) signed at London November 2, 1973, with annexes and protocols, Done at London, February 17, 1978 (Sen. Ex. C, 96th Cong., 1st Sess.).** The underlying MARPOL Convention was transmitted to the

Senate on March 22, 1977. A number of tanker incidents soon thereafter inspired the MARPOL signatories to reconsider many of the Convention's provisions, leading to the negotiation and conclusion of the 1978 Protocol. The 1978 Protocol was transmitted to the Senate on January 19, 1979 with a request from President Carter that the Senate give its advice and consent to the Protocol in place of the MARPOL Convention. The Senate subsequently gave its advice and consent to ratification by a resolution dated July 2, 1980.

(b) **Protocol Relating to the Status of Refugees, Done at New York January 31, 1967 (19 UST 6223, TIAS 6577).** This Protocol was designed to extend the coverage of the Convention Relating to the Status of Refugees, Done at Geneva, July 28, 1951 ("Convention") to cover persons who became refugees after January 1, 1951. Although the United States had not signed the Convention, Article V of the Protocol provided that it was "open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations . . ." As a result, the United States was eligible to become a party to the Protocol, which received Senate advice and consent to ratification on October 4, 1968.

(c) **Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Done at Mexico February 14, 1967 (22 UST 754, TIAS 7137).** The United States is not a party to the Treaty for the Prohibition of Nuclear Weapons in Latin America (the Treaty of Tlatelolco), Done at Mexico February 14, 1967 (22 UST 762), which limited contracting parties to "Latin American Republics and other states below Latitude 35° north in the Western Hemisphere." On April 1, 1968, the United States signed Protocol II, committing, among other things, not to use or threaten to use nuclear weapons against the Contracting Parties to the Treaty of Tlatelolco. The Senate gave its advice and consent to Protocol II on April 19, 1971.

(d) **Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Done at Mexico February 14, 1967 (33 UST 1792, TIAS 10147).** In addition to Protocol II, the United States also signed Protocol I wherein it committed to apply the status of denuclearization in respect of warlike purposes

in territories for which it was internationally responsible and which lay within the geographical zone established by the Treaty. Protocol I, which was transmitted to the Senate on May 24, 1978, received Senate advice and consent on November 13, 1981.

(e) **Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, with annexes and protocol, Signed at Washington September 7, 1977, as amended (33 UST 1, TIAS 10029).** This bilateral U.S.-Panama Treaty included a Protocol, titled the Protocol to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, by which other states agreed to observe and respect the regime of permanent neutrality of the Canal. Article 3 of the Protocol provided that accession was open to "all states of the world" and 36 States have since become a party to it.

3. Provisional Application through Memorandum of Understanding

On March 24, 2002, the United States reached agreement with certain South Pacific states and entities that comprise the South Pacific Forum Fisheries Agency ("FFA") to extend the operation of the 1987 multilateral Treaty on Fisheries Between the Governments of Certain Pacific Islands States and the Government of the United States of America, T.I.A.S. 11100 ("the Treaty"), and to make certain amendments to the Treaty. The Treaty provides access for U.S. purse seine vessels to fish for tuna in waters of the Pacific Island Parties, under certain operational requirements. Although the Treaty is of unlimited duration, the funding provisions found in the Treaty's annexes were originally designed to operate for five years. In 1993, the annexes' operation was extended for ten years, until June 14, 2003. Agreement was also reached in March 2002 to extend a related economic assistance agreement, which would also have expired by its terms on June 14, 2003. That agreement, which is a bilateral executive agreement between the United States and the FFA providing for economic support assistance to the Pacific Island States

to be used for economic stability and security, was signed at Majuro, Marshall Islands, on March 12, 2003.

The parties also decided to provide for the provisional application of all but one of the amendments to the Treaty, pending ratification, and entered into a memorandum of understanding for that purpose. The MOU, which is not legally binding, expresses the intention of the signatories to apply provisionally the agreed amendments to the Treaty and its annexes, as well as three amendments previously agreed to in 1999, from June 15, 2003, if they have not entered into force (which requires ratification by all parties) by that date. The only amendment not made part of the MOU would provide for a more streamlined and efficient procedure to amend the annexes of the Treaty; that amendment will apply only when ratified subject to the advice and consent of the Senate. The MOU was made available for signature, and was signed by the United States, at the Forum Fisheries Agency Committee meeting in Pohnpei, Federated States of Micronesia on May 9, 2002. For both the memorandum of understanding and the treaty amendments, the parties agreed that the initials of the representative of the government would be sufficient in lieu of full signature.

Excerpts below from the report of Secretary of State Colin L. Powell, dated December 28, 2002, submitting the amendments to the President for transmittal to the Senate for its advice and consent to ratification, describe the amendments to the treaty and the function of the MOU.

At the end of 2002, the amendments to the Treaty were being prepared for transmittal to the Senate for advice and consent to ratification. *See* S. Treaty Doc. No. 108–2 (Feb. 11, 2003).

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The Secretary of State,
Washington, December 28, 2002.

The President,
The White House.

The President: I have the honor to submit to you, with a view to transmission to the Senate for advice and consent to ratification, 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, ("the Treaty"), done at Koror, Palau March 30, 1999 and at Kiritimati, Kiribati March 24, 2002. The Treaty was ratified by the United States on December 21, 1987 and it entered into force on June 15, 1988. 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 fishing capacity in the Treaty Area and ways to promote consistency, where appropriate, between the Treaty and the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (the "WCPFC Convention"), done at Honolulu, Hawaii September 4, 2000. The Amendments to the Treaty Text are briefly described below. Related amendments to the Treaty Annexes and the Memorandum of Understanding regarding provisional application are also included for the information of the Senate.

The United States enjoys positive and constructive fisheries relations with the Pacific Island Parties through the implementation and operation of the Treaty. Since it entered into force in 1988, the Treaty has become the cornerstone of the economic and political relationship between the United States and these Pacific Island Parties. This good relationship on fisheries issues, as well as a common desire to conserve and manage fisheries resources in the South Pacific, has carried over into the multilateral effort to establish a conservation and management regime in the Western and Central Pacific. Under the Treaty, the U.S. industry pays an annual license fee of $4 million per year—a figure which will be reduced to $3 million under the Treaty extension, due to a decrease in the number of vessels to be licensed to fish in the Treaty Area.

To date, the Treaty has provided considerable economic benefits to the United States. The tuna harvested by U.S. vessels

under the Treaty contributes an estimated $250 to $400 million annually to the U.S. economy. Nearly all of this fish is landed at the two canneries in American Samoa, one owned by U.S. interests, which are the territory's largest employers.

Associated with the Treaty is the Economic Assistance Agreement between the United States and the South Pacific Forum Fisheries Agency. Under the current terms of the Agreement, the United States provides $14 million per year in Economic Support Funds (ESF) to the Pacific Island States to be used solely for economic stability and security. The payments under the associated Agreement are now the only significant source of U.S. economic support for the stability and security of the region outside the assistance provided to the Freely Associated States. The strong economic and political relationship with the Pacific Island States made possible by this Agreement also helps further U.S. Foreign policy goals through support from the Pacific Island States in international fora.

The Agreement expires June 14, 2003. To serve U.S. interests and to maintain the stability of this successful regime, in conjunction with the amendments to the Treaty and Annexes, the Agreement will be amended and extended for a term of 10 years. The United States and the Pacific Island parties have agreed that for the next term of the Agreement, the annual level of economic assistance provided by the U.S. Government under the Economic Assistance Agreement associated with the Treaty would be $18 million. It is anticipated that the United States and the South Pacific Forum Fisheries Agency will sign the new Economic Assistance Agreement in early 2003.

* * * *

The United States and the Parties also agreed on the text of a non-legally binding Memorandum of Understanding (MOU) that will have the effect of provisionally applying from June 15, 2003 (1) the Amendments to the Treaty (except for the amendments to Article 9) agreed in Kiritimati, Kiribati on March 24, 2002; (2) the Amendments to the Annexes agreed in Kiritimati, Kiribati on March 24, 2002; (3) the Treaty Amendment previously agreed

in Koror, Palau on March 30, 1999 that opens the high seas of the Treaty Area to U.S. longline vessels; and (4) two Amendments to the Annexes agreed in Koror, Palau on March 30, 1999 that close Papua New Guinea's archipelagic waters and open the waters of the Solomon Islands to U.S. vessels, if these amendments have not yet been approved by all Parties by June 15, 2003. This MOU is an important political commitment that will allow the U.S., among other things, to ensure that as of June, 2003, U.S. longline vessels will be able to fish in the high seas portions of the Treaty Area and that the waters of the Solomon Islands will be open even if every Party has not yet approved those amendments. Both of these issues have long been goals for the U.S. industry. A copy of the Memorandum of Understanding, done at Kiritimati, Kiribati March 24, 2002, is also enclosed for the information of the Senate.

Existing legislation, including the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. Sec. 1801 et seq. and the South Pacific Tuna Act of 1988, P.L. 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 to the Treaty. However, minor amendments to Section 6 of the South Pacific Tuna Act of 1988, P.L. 100–330 will be necessary to take account of the Amendment to paragraph 2 of Article 3 "Access to the Treaty Area."

* * * *

4. Application to States of the United States

At a meeting of the Secretary of State's Advisory Committee on Public International Law on November 8, 2002, the Office of the Legal Adviser distributed a paper summarizing U.S. views and practice in addressing federalism issues in treaties to which it is a party. The paper is excerpted below.

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

As a matter of law, the Supreme Court has refused to interpret the 10th Amendment as a limitation on the exercise of the Treaty Power. In practice, therefore, the United States has not traditionally taken advantage of so-called "federalism clauses" that allow federal states to modify their obligations under a treaty because of the legal division of competencies between a federal government and its constituent units.

As a matter of policy, however, the United States has, on occasion, sought to tailor certain international obligations to maintain the existing balance of federal-state relations with respect to the treaty's subject matter. These federalism concerns have emerged with increased frequency in recent years as the subject-matter of treaties has broadened beyond transnational issues to areas traditionally regulated by U.S. states.

The mechanisms by which the United States has sought to limit or clarify its treaty obligations because of federalism policy concerns have varied:

- It has sought to negotiate provisions that are consistent with the federal government's traditional authorities (i.e., avoiding federalism concerns where possible);
- It has attached understandings as part of its adherence to certain treaties that clarify the U.S. understanding that the treaty's obligations do not require action beyond existing federal authorities;
- In the context of certain human rights treaties, it has attached reservations or understandings that accept all of the treaty's obligations, but clarify that they will be implemented at the appropriate government level—federal, state or local;
- It has sought to negotiate new versions of a "federalism clause" that the United States could invoke as a matter of policy, rather than as a matter of law; and
- It has taken reservations to treaties to modify U.S. obligations to a level that the federal government is willing to assume.

* * * *

Survey of Past Practice with Respect to Federalism Issues in U.S. Treaties

I. Examples of Federalism Clauses/Reservations Used by the United States

- ***1948 OAS Charter***: The U.S. instrument of ratification included a reservation that none of the Charter's provisions "shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.[1]
- ***Instrument for Amendment of the Constitution of the International Labor Organization***: Article 19(7) provides:

  (b) in respect of Conventions and Recommendations which the Federal Government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent States . . . rather than for federal action, the Federal Government shall—
  (i) make, in accordance with its Constitution and the Constitutions of the States . . . concerned, effective arrangements for the reference of such Conventions and Recommendations not later than eighteen months from the closing of the session . . . to the appropriate federal [or] State . . . authorities for the enactment of legislation or other action;
  (ii) arrange, subject to the concurrence of the State . . . , for periodical consultations between the

[1] At the time, the United States reservation had to be accepted by all other states parties, which it was, although Mexico accepted the U.S. reservation on a reciprocal basis, but pointed out that it does not constitute a precedent, inasmuch as reservations of this nature pose the delicate problem of the fulfillment—on the part of the federal states—of obligations arising from international instruments. Uruguay communicated that it objects in principle to federalism reservations but would accept this one, given the unusual circumstances.

Federal and the State . . . authorities with a view to promoting within the federal State coordinated action to give effect to the provisions of such Conventions and Recommendations;

(iii) inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring such Conventions and Recommendations before the appropriate federal [or] State . . . authorities with particulars of the authorities regarded as appropriate and of the action taken by them;

(iv) in respect of each such Convention which it has not ratified, report to the Director-General of the International Labour Office . . . the position of the law and practice of the federation and its constituent States . . . , showing the extent to which effect has been . . . or is proposed to be given, to any of the provisions of the Convention . . . ;

(v) in respect of each such Recommendation, report to the Director-General of the International Labour Office . . . the position of the law and practice of the federation and its constituent States . . . , showing the extent to which effect has been . . . or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as have been found or may be found necessary in adopting or applying them.

- ***1967 Protocol to the Convention Relating to the Status of Refugees***: Article VI incorporates the provisions of Article 41 of the 1951 Convention Relating to the Status of Refugees, 189 UNTS 150, which reads as follows:

  In the case of a Federal or non-unitary State, the following provisions shall apply:

  (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the

> constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment.
>
> (c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

The Secretary of State's Report (July 25, 1968) that accompanied the President's transmittal of the Protocol to the Senate described the effect of Article VI:

> By virtue of Article VI of the Protocol, the United States would assume obligations only in respect of matters that come within the legislative jurisdiction of the Federal Government. State laws would not be superseded by any provision of the Convention. With respect to any articles of the Convention that may come within the legislative jurisdiction of the states under our constitutional system, the Federal Government is obligated to bring such articles to the notice of the appropriate state authorities with a favorable recommendation.

- ***1966 International Covenant on Civil and Political Rights***: The 1992 U.S. instrument of ratification contained a reservation, indicating that the Convention's provisions:

> [S]hall be implemented by the federal government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by state and local governments. The Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state . . . may take appropriate measures for the fulfillment of the Covenant."

This was in response to a clause in Article 50 of the Convention providing that the "provisions of the present Covenant shall extend to all parts of federal states without any limitations or exceptions." That Article had been inserted into the Covenant after the United States had proposed a federal-state clause, but then indicated in 1953 that the United States would not ratify the Covenants. A similar reservation was attached to the U.S. instrument of ratification to the International Covenant on the Elimination of All Forms of Racial Discrimination.

- ***1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment***: The 1994 U.S. ratification contained the following understanding:

> (5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing articles 10–14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.

During testimony regarding the Convention, the State Department Legal Adviser, Judge Sofaer made clear that this understanding was not intended to limit or circumscribe the obligations assumed by the United States, but addressed how the Convention's obligations would be implemented: "We simply wanted to make clear that we would not be violating the convention if there were certain steps that had to be taken by local or state government under our constitutional system."

- ***Council of Europe Corruption Convention (transmittal to Senate pending)***: The Convention requires Parties to criminalize "at the national level" various types of bribery. At the final negotiating session, negotiators agreed to a U.S. request to include in the official Explanatory Report a statement that Parties assume obligations under the Convention

"only to the extent consistent with their Constitution and the fundamental principles of their legal system, including, where appropriate, the principles of federalism." As an authoritative expression of the intentions of the Convention's negotiators, the United States is relying on this statement as the basis for implementing the Convention obligations solely at the federal level through federal law.

- ***Council of Europe Cybercrime Convention (transmittal to Senate pending)***: The Convention requires parties to criminalize certain conduct related to computer systems, to ensure that procedures are available to investigate cybercrime offenses, and to provide broad international cooperation in investigating such crimes and obtaining evidence. Since the United States traditionally regulates conduct based on its effects on interstate or foreign commerce, while matters of minimal or purely local concern are regulated by the states, the United States decided as a policy matter to pursue a provision in the text allowing it to take a federalism reservation. 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 required to criminalize. The United States successfully negotiated such a clause just prior to the Convention's adoption, despite the initial objection of several nations, notably France. Article 41 now reads as follows:

  1. A federal State may reserve the right to assume obligations under Chapter II of this Convention consistent with its fundamental principles governing the relationship between its central government and constituent States . . . provided that it is still able to co-operate under Chapter II.
  2. When making a reservation under paragraph 1, a federal State may not apply the terms of such reservation to exclude or substantially diminish its obligations to provide for measures set forth in Chapter II. Overall, it shall provide for a broad and effective law enforcement capability with respect to those measures.

3. With regard to the provisions of this Convention, the application of which comes under the jurisdiction of constituent States or other similar territorial entities, that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States of the said provisions with its favourable opinion encouraging them to take appropriate action to give them effect.

II. Examples of Federalism Clauses Not Invoked by the United States

- **1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards**: Article XI is identical to Article VI of the Refugee Protocol (see above). The article-by-article analysis that accompanied the transmittal of the Convention to the Senate described the effect of this provision:

  > This article recognizes the special situation with respect to jurisdiction in federal or nonunitary States and attempts to accommodate such States. It would, however, run counter to the express provisions of the article for the United States to seek to take advantage of its provisions with respect to foreign arbitral awards arising out of commercial relationships. The Federal Arbitration Act of 1925 (9 U.S.C. 1–14) and the decisions of U.S. Courts relating thereto show that legislation on arbitration is clearly within the competence of the Federal Government.[2]

[2] The SFRC Report (Sen. Executive Rept. 10, 90th Cong., 2d Session) contains the testimony of Amb. Richard D. Kearney of State/L. Amb. Kearney's testimony points out that the effect of the Convention on the laws of U.S. States is mitigated by the gradual adoption by states of uniform laws on arbitration procedures and widespread support of Courts and the bar that will enable the Convention to be enforceable in a growing majority of U.S. States. To a query whether the Convention would extend Federal jurisdiction into new areas, Kearney replied that the Federal Arbitration Act already provided more than is required by the Convention.

- **1992 UNESCO Convention for the Protection of World Cultural and Natural Heritage:** Article 34, provides:

  > (b) with regard to the provisions of this Convention, the implementation of which comes under the legislative jurisdiction of individual constituent states, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such states, countries, provinces or cantons of the said provision, with its recommendation for their adoption.

5. Termination

a. Litigation concerning role of U.S. Congress

On December 30, 2002, the U.S. District Court for the District of Columbia dismissed a suit brought by 32 members of the House of Representatives against the President of the United States, the Secretary of State, and the Secretary of Defense, challenging the President's unilateral decision to withdraw from the 1972 Anti-Ballistics Missile Treaty ("ABM Treaty"), 23 U.S.T. 3435 (1972), originally entered into between the United States and the USSR. *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002). Plaintiffs alleged that because the Supremacy Clause of the Constitution classifies treaties, like Acts of Congress, as the "supreme Law of the Land," the President cannot terminate a treaty without congressional consent, any more than he could repeal a statute. In dismissing the action, the district court held that plaintiffs have alleged "only an institutional injury to Congress, not injuries that are personal and particularized to themselves," and thus lacked standing under Article III of the U.S. Constitution to bring the suit.

As to plaintiffs' efforts to pass legislation requiring the President to seek the approval of Congress for withdrawal from the ABM Treaty, the court noted, "[t]here has been no

claim here that their votes were not given full effect. Rather, 'they simply lost that vote.' [*Raines v. Byrd*, 521 U.S.811, 824 (1997)].". The court concluded:

> . . . The congressmen claim that they have been divested of their constitutional role in treaty termination. That is no different from the alleged injury in *Chenoweth* [*v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999)]—being divested of a role in voting on and approving or rejecting legislation—or the alleged injury in *Campbell* [*v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000)]—being divested of a role in declaring war. Indeed, the injury alleged by plaintiffs here, that President Bush's termination of the ABM Treaty "diluted their Article I voting power," is virtually indistinguishable from the injuries asserted in *Chenoweth* and *Campbell*.

The court noted that plaintiffs "have a number of other, equally effective remedies available to pressure the President to obtain congressional consent to the termination of the ABM treaty." Such remedies include use of the appropriations power, legislation specifically prohibiting development or deployment of ABM systems, Senate power to reject presidential nominees, and advice and consent to other treaties.

Excerpts from the court's decision concluding that the treaty termination issue constituted a "nonjusticiable political question" are set forth below.

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To be sure, "while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty." Goldwater [v. Carter], 444 U.S. 1003 (Rehnquist, J., concurring); see also Made in the USA Foundation [v. United States], 242 F.3d 1315 (the Constitution "fails to outline the Senate's role in the abrogation of treaties"). There is thus no textual commitment of the authority over treaty termination to any branch of the government. The Constitution, however, clearly relegates authority

over foreign affairs to the Executive and Legislative Branches, with no role for the Judicial Branch to second-guess or reconsider foreign policy decisions. "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.' " Haig v. Agee, 453 U.S. 280, 292, 69 L. Ed. 2d 640, 101 S. Ct. 2766 (1981) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589, 96 L. Ed. 586, 72 S. Ct. 512 (1952)).

The very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and have long been held to belong to the domain of political power not subject to judicial intrusion or inquiry.

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111, 92 L. Ed. 568, 68 S. Ct. 431 (1948); see also Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 386, 147 L. Ed. 2d 352, 120 S. Ct. 2288 (2000) ("the nuances of the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court") . . .

At the same time, it would be "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker, 369 U.S. at 211. But on the very issue before this Court—whether the Constitution provides a congressional role in treaty termination—four Justices in Goldwater concluded that the issue was a nonjusticiable political question "because it involved the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President." 444 U.S. at 1002. Moreover, the plurality's conclusion that the issue was political in nature was "even more compelling . . . because it involves foreign relations—specifically a treaty commitment to use military force in the defense of a foreign government if attacked." 444 U.S. at 1003, 1004. So, too, here the treaty termination issue lies squarely in the arena of foreign relations and involves national defense considerations in that foreign affairs setting.

The circumstances here present "an unusual need for unquestioning adherence to a political decision already made."

Baker, 369 U.S. at 217. President Bush publicly announced his intention to withdraw from the ABM Treaty on December 13, 2001, providing Russia with the six-months notice required by the Treaty. These thirty-two congressmen, however, waited until two days before that termination became effective to bring this lawsuit. Meanwhile, long aware of the intention of the United States to withdraw from the ABM Treaty, Russia may have acted based upon the President's notice of termination. Foreign governments must be able to rely upon the pronouncements of the United States regarding its treaties.

Hence, were this Court to find the President acted unconstitutionally, and overturn his decision to terminate the ABM Treaty more than a year after he announced the decision, "the potential [] of embarrassment from multifarious pronouncements by various departments on one question" would be undeniable. Baker, 369 U.S. at 217; see also Made in the USA Foundation, 242 F.3d at 1305. "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments . . . [is a] dominant consideration." Coleman [v. Miller], 307 U.S. at 454–55. With treaties, in particular, a single voice is needed:

> It is not surprising, then, that many questions arising in connection with our treaties with other governments have been held to be nonjusticiable. For "not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views."

Holmes v. Laird, 148 U.S. App. D.C. 187, 459 F.2d 1211, 1215 (D.C. Cir. 1972) (quoting Baker, 369 U.S. at 211).

Courts have therefore repeatedly held that issues concerning treaties are largely political questions best left to the political branches of the government, not the courts, for resolution. Since Goldwater, one other court has held that the role of Congress in

the termination of a treaty presents a nonjusticiable political question. In Beacon Products Corp. v. Reagan, 633 F. Supp. 1191, 1198–99 (D. Mass. 1986), aff'd on other grounds, 814 F.2d 1 (1st Cir. 1987), the court relied on the plurality opinion in Goldwater to hold that a constitutional challenge to President Reagan's unilateral termination of the Treaty of Friendship, Commerce, and Navigation with Nicaragua, without congressional consent, raised a political question. The court concluded that in Goldwater "the challenge to the President's power vis-a-vis treaty termination raised a nonjusticiable political question. That holding is equally applicable here." 633 F. Supp. at 1199.

* * * *

b. Treaties terminated by the President

In 2002 the Office of Treaty Affairs in the Office of the Legal Adviser, U.S. Department of State, prepared the following list of treaties terminated by the President since 1980. In each case, the treaty was entered into with the advice and consent of the Senate to ratification, pursuant to Article II, Section 2 of the U.S. Constitution.

BILATERAL TREATIES

- Treaty of naturalization with Albania. Signed at Tirana April 5, 1932. 49 Stat. 3241, T.S. 892, 5 Bevans 20.
  Terminated by Article III of the Memorandum of understanding between the United States and Albania concerning the re-establishment of diplomatic relations, signed at Washington March 15, 1991.
- Naturalization convention with Belgium. Signed at Brussels November 16, 1868. 16 Stat. 747, T.S. 24, 5 Bevans 476.
  Notice of termination given by the United States on October 20, 1980; effective October 20, 1981.
- Treaty of naturalization with Czechoslovakia. Signed at Prague July 16, 1928. 46 Stat. 2424, T.S. 804, 6 Bevans 1266.

Terminated by exchanges of notes between the U.S. and the Czech Republic and the U.S. and the Slovak Republic. Terminated as between the U.S. and the Slovak Republic on July 7, 1997; as between the U.S. and the Czech Republic on August 20, 1997.

- Naturalization convention with Costa Rica. Signed at San Jose June 10, 1911. 37 Stat. 1603, T.S. 570, 6 Bevans 1027.
  Notice of termination given by the United States on October 20, 1980; effective October 20, 1981.
- Naturalization convention with Denmark. Signed at Copenhagen July 20, 1872. 17 Stat. 941, T.S. 69, 7 Bevans 24.
  Notice of termination given by the United States on October 3, 1980; effective October 3, 1981.
- Naturalization convention with El Salvador. Signed at San Salvador March 14, 1908. 35 Stat. 2038, T.S. 503, 7 Bevans 503.
  Notice of termination given by the United States on October 20, 1980; effective October 20, 1981.
- Naturalization treaty with Haiti. Signed at Washington March 22, 1902. 33 Stat. 2101, T.S. 432, 8 Bevans 650.
- Treaty with Haiti extending the time within which may be effected the exchange of ratifications of the treaty of naturalization signed March 22, 1902. Signed at Washington February 28, 1903. 33 Stat. 2157, T.S. 433, 8 Bevans 652.
  Notice of termination given by the United States on October 20, 1980; effective October 20, 1981.
- Naturalization convention with Honduras. Signed at Tegucigalpa June 23, 1908. 36 Stat. 2160, T.S. 525, 8 Bevans 890.
  Notice of termination given by the United States on October 20, 1980; effective October 20, 1981.
- Treaty with Lithuania defining liability for military service and other acts of allegiance of naturalized persons and persons born with double nationality. Signed at Kaunas October 18, 1937. 53 Stat. 1569, T.S. 936, 9 Bevans 690.
  Notice of termination given by the United States on October 24, 1980; effective October 24, 1981.
- Agreement with Malta with respect to taxes on income, with related exchange of notes. Signed at Valletta March 21, 1980. T.I.A.S. 10567.

Notice of termination given by the United States on November 15, 1995; effective January 1, 1997.

- Convention with the Netherlands with respect to taxes on income and certain other taxes. Signed at Washington April 29, 1948. 62 Stat. 1757, T.I.A.S. 1855, 10 Bevans 225.
- Protocol with the Netherlands supplementing the convention of April 29, 1948 with respect to taxes on income and certain other taxes for the purpose of facilitating extension to the Netherlands Antilles. Signed at Washington June 15, 1955. 6 U.S.T. 3696, T.I.A.S. 3366.
- Protocol with the Netherlands modifying and supplementing the extension to the Netherlands Antilles of the convention for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and certain other taxes of April 29, 1948, as supplemented by the Protocol of June 15, 1955. Signed at The Hague October 23, 1963. 15 U.S.T. 1900, T.I.A.S. 5665.

  The 1948 convention, as modified and supplemented, continued to apply to Aruba upon its separation from the Netherlands Antilles on January 1, 1986. Exchanges of notes between the U.S. and the Netherlands June 29, July 10, September 11 and October 2, 1987 terminated application of the 1948 convention to the Netherlands Antilles and Aruba with the exception of Article VIII; effective January 1, 1988.
- Naturalization convention with Nicaragua. Signed at Managua December 7, 1908. 37 Stat. 1560, T.S. 566, 10 Bevans 362.
- Supplementary naturalization convention with Nicaragua. Signed at Managua June 17, 1911. 37 Stat. 1563, T.S. 567, 10 Bevans 377.

  Notice of termination given by the United States on October 24, 1980; effective October 24, 1981.
- Treaty of friendship, commerce and navigation, and protocol with Nicaragua. Signed at Managua January 21, 1956. 9 U.S.T. 449, T.I.A.S. 4024.

  Notice of termination given by the United States on May 1, 1985; effective May 1, 1986.

- Naturalization convention and protocol with Norway. Signed at Stockholm May 26, 1869. 17 Stat. 809, T.S. 350, 11 Bevans 888.
  Notice of termination given by the United States on October 3, 1980; effective October 3, 1981.
- Naturalization convention with Peru. Signed at Lima October 15, 1907. 36 Stat. 2181, T.S. 532, 10 Bevans 1079.
  Notice of termination given by the United States on October 24, 1980; effective October 24, 1981.
- Naturalization convention with Portugal. Signed at Washington May 7, 1908. 35 Stat. 2082, T.S. 513, 11 Bevans 322.
  Notice of termination given by the United States on October 20, 1980; effective April 20, 1981.
- Naturalization convention and protocol with Sweden. Signed at Stockholm May 16, 1869. 17 Stat. 809, T.S. 350, 11 Bevans 888.
  Notice of termination given by the United States on October 3, 1980; effective October 3, 1981.
- Treaty on the limitation of anti-ballistic missile systems with the Union of Soviet Socialist Republics. Signed at Moscow May 26, 1972.[1] 23 U.S.T. 3435, T.I.A.S. 7503.
  Notice of termination given by the United States on December 13, 2001; effective June 13, 2002.
- Naturalization convention with Uruguay. Signed at Montevideo August 10, 1908. 36 Stat. 2165, T.S. 527, 12 Bevans 984.
  Notice of termination given by the United States on October 20, 1980; effective October 20, 1981.

MULTILATERAL TREATIES

- Convention establishing the status of naturalized citizens who again take up their residence in the country of their origin.

[1] The Protocol to the Treaty on the limitation of anti-ballistic missile systems with the Union of Soviet Socialist Republics, signed at Moscow July 3, 1974, terminated simultaneously upon termination of the Treaty. 27 U.S.T. 1645, T.I.A.S. 8276.

Signed at Rio de Janeiro August 13, 1906. 37 Stat. 1653, T.S. 575, 1 Bevans 544.
United States withdrawal effective October 20, 1981.

- Convention relating to international exhibitions. Done at Paris November 22, 1928. 19 U.S.T. 5927, T.I.A.S. 6548.
- Protocol modifying the convention of November 22, 1928 relating to international exhibitions. Done at Paris May 10, 1948. 19 U.S.T. 5927, T.I.A.S. 6548.
- Protocol modifying Article IV of the convention of November 22, 1928, as amended, relating to international exhibitions. Done at Paris November 16, 1966. 19 U.S.T. 5974, T.I.A.S. 6549.
- Protocol revising the convention of November 22, 1928 relating to international expositions, with appendix and annex. Done at Paris November 30, 1972. 32 U.S.T. 4283, T.I.A.S. 9948.
  United States withdrawal effective April 27, 2002.
- Statutes of the World Tourism Organization. Done at Mexico City September 27, 1970. 27 U.S.T. 2211, T.I.A.S. 8307.
  United States withdrawal effective December 26, 1996.
- Constitution of the United Nations Industrial Development Organization, with annexes. Done at Vienna April 8, 1979. S. Treaty Doc. No. 97–19 (1981).
  United States withdrawal effective December 31, 1996.

6. Reservation Practice: Iceland Whaling

In July 2001, at its 53rd annual meeting, the International Whaling Commission ("IWC") refused to accept a reservation by Iceland contained in its instrument of adherence to the International Convention on the Regulation of Whaling, Dec. 2, 1946, 1953 U.N.T.S. 74. The reservation was to the moratorium on commercial whaling in paragraph 10(e) of the Convention Schedule. *See Digest 2001* at 214–218. In May 2002 Iceland again filed an instrument of adherence with the United States as depositary. This instrument also contained a reservation to the moratorium on whaling for commercial purposes.

At the May 2002 IWC annual meeting in Shimonoseki, Japan, the IWC voted to uphold the 2001 decision which did not allow Iceland to become a party but did allow it to "assist in the meeting as an observer." 54th Annual Meeting, Final Press Release, *www.iwcoffice.org/2002PressRelease.htm*. At the annual meeting, the United States provided an analysis of its views on the invalidity of the reservation, excerpted below.

In a special meeting called in October 2002, the issue of whether the Commission should accept Iceland's reservation was again discussed. The final press release from the special meeting announced that "the Commission agreed by 19 votes to 18, that Iceland is a member of the Commission." *See www.iwcoffice.org/Final%20Press%20Release%202002SM.htm.*

The full text of the U.S. position paper is available at *www.state.gov/s/l/c8183.htm.*

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. . . For the reasons outlined below, the United States is of the view that the Commission acted legally in all respects regarding this matter during the 53rd Annual Meeting. Given the Commission's decisions, the United States recognizes Iceland as an observer to the IWC Commission, but not as a Party to the Convention.

The Ministry of Foreign Affairs' note takes the position that a general principle of international law governs the question of the acceptability of Iceland's reservation, i.e., that Iceland's reservation is only subject to explicit or implicit acceptance by individual parties to the Convention. The note rejects the availability of an exception to that rule where the constituent instrument of an international organization is subject to acceptance by the relevant body of that organization. Specifically, Iceland argues that reservations to the Schedule should not be subject to acceptance by the IWC because the Schedule does not incorporate provisions of an organizational nature, which are the sort of provisions for which the exception was developed.

Both the general principle and the exception cited by Iceland appear to be based on the terms of Article 20 of the 1969 Vienna Convention on the Law of Treaties (VCLT). Article 20(3) of the VCLT provides that "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization." Article 20(4) of the VCLT provides for acceptance and rejection of a reservation by individual parties to other sorts of treaties under the principle that "an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation."

Even though it is not a party to the VCLT, the United States considers it to be the authoritative guide to current treaty law and practice. By its terms, the VCLT does not apply directly to treaties concluded prior to its entry into force. Accordingly, the VCLT's January 27, 1980 entry into force date precludes it from applying directly to the 1946 IWC Convention.

However, VCLT Article 4, in providing for its non-retroactivity, also provides that this condition is "[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention." Accordingly, to the extent the provisions of the VCLT reflect customary international law, they may be invoked to address Iceland's reservation to the Convention.

Looking at the VCLT as a whole, however, the United States is of the view that there is no need to reach the question of Article 20's applicability to Iceland's reservation (although it is worth noting that the Schedule to which Iceland attached a reservation forms an "integral part" of the Convention and that article 20(3) by its terms applies to the "constituent instrument" of an international organization like the IWC without any distinction as to its "organizational" provisions). Another VCLT article applies—Article 5.

VCLT Article 5 provides in part that the VCLT's norms apply to any treaty which is the constituent instrument of an international organization "without prejudice" to any relevant rules of the

organization. In this instance, there are relevant rules that are applicable to Iceland's reservation, so it is unnecessary to address the application of Article 20. These relevant rules are the provisions of the Convention that deal with amending the Schedule.

As noted in the U.S. Opening Statement to the IWC, the United States' views are based on the fact that Iceland's reservation constitutes, in effect, a proposed amendment to the Schedule. The reservation by its terms would amend paragraph 10(e) of the Schedule to modify its legal effect. Currently, zero catch limits for commercial whaling apply to all parties to the Convention under paragraph 10(e) except for those states that filed objections in accordance with Article V(3) of the Convention. Article V(3) of the Convention allows states to object to amendments adopted by the IWC within a 90-day time frame. If a government does object, the amendment does not become effective for any states for an additional 90 days, thereby allowing governments which did not originally object to review the situation created by the non-participation of one or more other governments. In the case of the moratorium, its adoption was originally notified on 6 August 1982. Four states (Peru (on 26 October 1982), Norway (on 2 November 1982), U.S.S.R. (on 3 November 1982), and Japan (on 4 November 1982) objected within the requisite 90 days, and therefore the amendment did not become effective until 3 February 1983, 180 days after states were notified of its adoption. Iceland, which was a party to the convention at the time, did not take advantage of its right to object to the amendment during either the original or additional 90-day periods.

Iceland's reservation, therefore, would amend the Schedule by modifying the current scope of application of Paragraph 10(e) with respect to all parties. Instead of all IWC Contracting Parties being bound to the commercial moratorium except for those states that objected in accordance with Article V(3) of the Convention, the commercial moratorium would apply to all states except those that objected and Iceland. Moreover, Iceland's reservation would amend paragraph 10(e) by permanently exempting Iceland from such zero catch limits without affording other governments the opportunity to review their own positions with respect to such an exemption in accordance with Article V(3).

Furthermore, the practice of parties to the Convention supports extending the Convention's rule on amendments to the Schedule to apply to reservations to the Schedule as well. The only previous proposed reservation to the Schedule was treated as an amendment to the Schedule. In 1948, Denmark requested the views of governments concerning its proposal to ratify the IWC Convention with a reservation to a portion of the Schedule. Specifically, Denmark sought to exclude the application to factory ships of Schedule provisions on regulations governing the operation of land stations if those factory ships were operating under the jurisdiction of the Danish government, and moving entirely within Danish territorial waters, including the territorial waters of the Faroe Islands and Greenland.

Four founding Parties of the Convention—Norway, the U.S.S.R., the United Kingdom and the United States—objected to the proposed reservation, each indicating that the matter should be referred to the IWC when it was established, the IWC Convention not yet having entered into force (the other 10 states indicated that they were prepared to accept the Danish reservation).

In a May 12, 1949 note to Denmark, the United States, acting as depositary, informed Denmark that "certain of the signatory and adhering governments to the International Convention for the Regulation of Whaling have stated that they cannot agree to the ratification of the Convention with the reservation proposed by Denmark as this reservation would constitute an amendment to the schedule annexed to the Convention and is therefore a matter which should be submitted to the International Whaling Commission for consideration when it is established."

As a result of these objections, Denmark did not make its proposed reservation when it deposited its instrument of ratification to the IWC Convention on May 23, 1950. The United States takes the view that the Danish case provides precedent within the IWC for considering these types of reservations as amendments to the Schedule.

Since Iceland's reservation would constitute an amendment to the Schedule, it required IWC acceptance. Articles III and V of

the Convention invest the IWC with the authority to amend the provisions of the Schedule by a three-fourths majority of those members voting. Absent three-fourths of the IWC members accepting Iceland's reservation, Iceland's reservation does not accord with the Convention's rules. In such circumstances, the United States views the IWC decision to continue to treat Iceland as an observer to be legally valid.

Iceland's reservation (and the reservation proposed by Denmark) are materially different from the statements made by Argentina, Chile, Peru, and Ecuador when those states became parties to the Convention. None of the statements related to the Convention's Schedule. Moreover, although styled as reservations, these statements did not modify the legal effect of the Convention's provisions with respect to other IWC parties. Argentina's statement, to which the United Kingdom objected, related to reaffirming its claim over the Falkland/Malvinas islands and other territories in the Antarctic region, without modifying the rights and obligations it assumed under the Convention. Similarly, the statements of Chile, Peru and Ecuador related to their views regarding certain provisions of the Law of the Sea Convention. They did not have any direct bearing on the rights and obligations among the parties since the Convention applies to all waters of parties to the Convention. In contrast, as noted above, the Icelandic reservation would modify directly and substantially the legal rights and obligations of the IWC Parties.

Finally, the Ministry of Foreign Affairs' note takes the position that the validity of a reservation with respect to a provision of an international agreement must be judged on the basis of whether it is compatible with the object and purpose of the agreement in question (a principle codified in VCLT Art. 19(c)). Since in Iceland's view, the reservation is consistent with the object and purpose of the Convention, the reservation cannot be rejected. Aside from ignoring the applicable rules of the Convention for accepting amendments to the Schedule, such an approach fails to fully reflect the distinction in the VOLT between the admissibility and acceptability of reservations. All reservations must be "admissible" —i.e., compatible with a treaty's object and purpose. However,

simply because a reservation is compatible with a treaty's object and purpose does not render it legally valid. It must also be "accepted" by other states parties to the treaty, which, as detailed above, in the case of the Convention is done through a vote before the IWC.

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C. ROLE IN LITIGATION

No Private Right of Action

a. Agreements between Mexico and the United States

On August 23, 2002, the U.S. District Court for the Northern District of California dismissed claims against the United States, Mexico, Wells Fargo Bank, and three Mexican government-owned banks. *Cruz v. U.S.*, 219 F. Supp. 2d 1027 (N.D.Cal. 2002). The claims had been brought on behalf of Mexican nationals, often referred to as *braceros*, who had worked as agricultural or railroad laborers between 1942 and 1949 pursuant to international agreements between the United States and Mexico. The district court described the circumstances in which the claims arose as follows:

> With the outbreak of World War II, many American workers left their domestic jobs and joined the war effort. To address the resultant labor shortage, the United States looked to Mexico. On August 4, 1942 the United States and Mexico entered into the first in a series of agreements under which Mexican workers would come to work in United States. This first agreement covered agricultural workers.
>
> The 1942 agreement between Mexico and the United States provided that the United States would enter a separate contract with each individual *bracero*. The United States then subcontracted the worker to the actual farmer or farmer association. Both the 1942 agreement between Mexico and the United States and the standard contract

> governing the relationship between each worker and the United States provided that ten percent of each worker's wages be retained and deposited into a Savings Fund. Upon proper application, the Savings Fund deductions were to be returned to the *bracer*o when he returned to Mexico.

Agreements altering these arrangements were entered into between Mexico and the United States in 1943, 1948, and 1949. Pursuant to the 1943 agreement, Savings Fund deductions were terminated on January 1, 1946. Under the 1948 and 1949 agreements, each *bracero* entered into a contract directly with his employer, and the United States was no longer a signatory to the individual work contract. The last agreement between the United States and Mexico expired December 31, 1964. The United States and Mexico also entered into a similar agreement to supply labor to the railroad industry in 1943. The railroad *braceros* program terminated in early 1946 and was never revived.

All claims against the Mexican defendants and Wells Fargo were dismissed without leave to amend. The court's analysis of sovereign immunity in its dismissal of the claims against Mexico is discussed in Chapter 10.A.5.c., below.

A claim against the United States based on fiduciary duty was dismissed without leave to amend. All other claims against the United States were dismissed as time-barred under the applicable statute of limitations, with leave to amend. The court did not address plaintiffs' arguments that the U.S.-Mexico agreements involved in this case provided them with a private right of action. The United States had refuted that argument in its memorandum of points and authorities in support of its motion to dismiss, filed January 11, 2002, as set forth in the excerpts below.

The full text of the memorandum of points and authorities is available at *www.state.gov/s/c8183.htm*.

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1. The International Agreements Contain No Provision Permitting Suits Against the United States

It is well-settled that treaties and international executive agreements[81] are presumed not to create privately-enforceable rights. The Supreme Court instructed long ago that:

> A treaty[82] 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. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress. . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress.

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[81] There are three types of international agreements other than treaties subject to the Senate advice and consent to ratification: (1) congressional-executive agreements, executed by the President Upon specific authorizing legislation from Congress; (2) international agreements pursuant to treaty, executed by the President in accord with specific instructions in a prior, formal treaty; and (3) executive agreements executed pursuant to the President's own constitutional authority. *United States v. Walczak*, 783 F.2d 852, 855 (9th Cir. 1986); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 (1986) ["Id Restatement of Foreign Relations"]. They are binding on the United States and "may in appropriate circumstances have an effect similarto treaties in some areas of domestic law," even though they do not comply with the formalities required by Art. II, § 2, cl.2 of the Constitution. *Weinberger v. Rossi*, 456 U.S. 25, 30 n. 6 (1982); see also *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

[82] The term "treaty" is generally used loosely to cover executive agreements. *See* 3d Restatement of Foreign Relations § 303, comment a. Indeed, "[u]nder principles of international law, the word [treaty] ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force." *Weinberger*, 456 U.S. at 29. Thus, unless there is "some affirmative expression of congressional intent to abrogate the United States' international obligations," *id.* at 32, the term "treaty" generally extends to not only Art. II treaties, but also other international agreements executed by the President. *See, e.g., id.* at 32–36 (statutory reference to "treaty," without limiting it to only Art. II treaties, construed to cover executive agreements).

Head Money Cases, 112 U.S. 580, 598–99 (1884); see also *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001) ("As a general matter . . . there is a strong presumption against conferring individual rights from international treaties."); *United States v. Li*. 206 F.3d 56, 60 (1st Cir.) (en banc), *cert. denied*, 531 U.S. 956 (2000); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992), *cert. denied*, 506 U.S. 955 (1992); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); *Diggs v. Richardson,* 555 F.2d 848, 851 (D.C. Cir. 1976).

Because "[t]reaties are contracts between or among independent nations," *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1998); *see* also *Trans World Airlines v. Franklin Mint Corp*. 466 U.S. 243, 253 (1984), "individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved." *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.), *cert. denied*, 498 U.S. 878 (1990); *accord Zabaneh*, 837 F.2d at 1261 (treaties are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress"); *United States v. Mann*. 829 F.2d 849, 852–53 (9th Cir. 1987); *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 167 (3d Cir. 1997). Thus, even where a treaty provides benefits for nationals of a particular state, any rights arising from it belong only to the nation-states, and individual rights are only derivative through the states. *De La Pava*, 268 F.3d at 164; *Li*, 206 F.3d at 61; *Matta-Ballesteros*, 896 F.2d at 259; 3d Restatement of Foreign Relations § 907, comment a ("International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts[.]").

To be sure, the presumption that treaties do not create a judicially enforceable private right of action may be overcome if the treaty manifests an intent to do so. *See Mann*, 829 F.2d at 852 ("A treaty may create standing if it indicates the intention to 'establish direct, affirmative, and judicially enforceable rights."). But such an intent must be explicit; the treaty itself must explicitly

confer on private citizens rights enforceable in court.[83] *See Li*, 206 F.3d at 66–67 (Selya, J. and Boudin, J., concurring) (the presumption against private right of action "certainly can be overcome by explicit language that is easy to draft and to insert, just as a contract can provide expressly that rights created by it may be enforced in court by a third-party beneficiary"); *Goldstar*, 967 F.2d at 968; *Garcia*, 109 F.3d at 167 ("individuals ordinarily may not challenge treaty interpretations in the absence of an express provision within the treaty *Matta-Ballesteros*, 896 F.2d at 259–60; *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937–38 (D.C. Cir. 1988); *United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981). *Cf. Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647, 652–53 (9th Cir. 1989) (trusteeship agreement with former Japanese mandated islands for the benefit of the islanders did not create a private right to monetary damages against the United States because, *inter alia*, the treaty did not indicate an intent to create such a right), *cert. denied*, 496 U.S. 925 (1980).

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[83] It should be noted that courts sometimes conflate the question of whether a treaty is "self-executing" with whether the treaty creates private enforcement rights. *See, e.g., Reagan*, 895 F.2d at 938; Goldstar, 967 F.2d at 967; People of Saipan v. Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). Although these courts use the term "self-executing" in a broad sense to refer to a treaty that *both* takes effect without implementing legislation *and* creates a private right of action, the two concepts are technically distinct. *See* 3d Restatement of Foreign Relations § 101 and comment h; 206 F.2d at 67–68 (Selya, J. & Boudin, J., concurring). A "self-executing" treaty is one that takes effect as federal law without implementing legislation. *Id.; see also Islamic Republic of Iran v. Boeing*, 771 F.2d 1279 (9th Cir. 1985) (determining whether treaty was self-executing or merely executory). "Whether the terms of such a treaty provide for private rights, enforceable in domestic courts, is a wholly separate question." *Li*, 206 F.2d at 67–68 (Selya, J. & Boudin, J., concurring); *see* also 3d Restatement of Foreign Relations § 101, comment h. "The self-executing character of a treaty does not by itself establish that the treaty creates private rights." *Li*, 206 F.2d at 67–68 (Selya, J. & Boudin, J., concurring); *see, e.g., Seguros Commercial America v. Hall*, 115 F. Supp. 2d 1371 (M.D. Fla. 2000) (convention found to be self-executing but did not create a private right of action).

The five relevant international agreements covering the period 1942 to 1949—Agreements of August 4, 1942; April 26, 1943; April 29, 1943; February 20 and 21, 1948; and August 1, 1949—give no indication that the agreements were intended to confer upon the individual Mexican workers judicially enforceable rights against the United States. Instead, they merely called upon the two governments to take certain actions, and their terms are addressed to the rights and obligations of the two governments. For example, under the 1942 agreement (as amended in 1943), which formed the basic structure of the wartime Mexican farm labor program, the two governments agreed that the United States would execute the individual worker's contract "under the supervision of the Mexican Government" (Ex. 1 at 56 Stat. 1966); that the Mexican health authorities would ensure that the worker met the necessary physical conditions (*id.*); that the United States would advise Mexico as to the number of workers needed and Mexico should determine in each case the number of workers who may leave the country without detriment to its national economy (*id.* at 56 Stat. 1768); that the United States would ensure that Mexican government inspectors would have free access to the Mexican workers' places of work (Ex. 2 at 57 Stat. 1161); and that either government had the right to terminate the agreement upon a 90-day notice (Ex. 1 at 56 Stat. 1769).

Although the international agreements also outlined the terms and conditions of the Mexican workers' employment, they unambiguously indicated that those rights and obligations were to be included in the individual work contracts and triggered only by the worker's execution of the contract. Indeed, the fact that the two governments believed that individual contracts between the United States and the workers were necessary belies any suggestion that the international agreements themselves created privately enforceable rights. The workers' recourse against the United States was to sue under the individual contracts or seek the diplomatic assistance of the Mexican consuls, *see* Ex. I at 56 Stat. at 1767 ("The Mexican Consuls in their respective jurisdiction shall make every effort to extend all possible protection to all these workers on any questions affecting them."); Ex. 2 at 57 Stat. 1161 ("[t]he Mexican Consuls, assisted by the Mexican Labor Inspectors, will

take all possible measures of protection in the interests of the Mexican workers in all questions affecting them"); Ex. 21 at 57 Stat. 1357; Ex. 18 at 62 Stat. 3891.

Finally, the 1942 agreement also made clear that the subject matter of the Mexican labor supply program was to be treated as a matter between states. *See, e.g.*, Ex. 1 at 56 Stat. 1764 ("For purpose of determining the scope of this matter it was agreed, as Your Excellency is aware, to treat it as a matter between States"); *see also id*. at 56 Stat. 1765 ("In order to determine the scope of the conditions under which Mexican labor might proceed to the United States. . . . , it was agreed that the negotiations should be between our two Governments . . ."). These references are consistent with the principle of international law discussed above that international agreements are binding only as between the state parties.—Nothing rebuts the strong presumption that the international agreements at issue are not enforceable against the United States by the individual Mexican workers.

Without any explicit language permitting suit against the United States in the international agreements at issue, sovereign immunity is a complete defense to plaintiffs' claims against the United States under those agreements. *See Canadian Transport Co. v. United States*. 663 F.2d 1081, 1092 (D.C. Cir. 1980) ("In the absence of specific language in the treaty waiving the sovereign immunity of the United States, the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom."); 3d Restatement of Foreign Relations § 907, comment c (suits against the United States pursuant to international agreements "will not lie unless the United States has consented"); *see, e.g., Goldstar*, 967 F.2d at 967–68 (sovereign immunity a complete defense to plaintiffs' damages claims against the United States under the Hague Convention); *Canadian Transport Co*. 663 F.2d at 1092; *cf. Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 442 (1989) (foreign sovereign immunity complete defense to private action in United States courts where the international conventions only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs, but did not waive immunity).

* * * *

b. U.S.-Iran Treaty of Amity, Economic Relations and Consular Rights

On October 7, 2002, the Supreme Court denied certiorari in a case concerning claims for expropriation against Iran. *Islamic Republic of Iran v. McKesson HBOC, Inc.*, 123 S.Ct. 341 (Mem.) (2002). In August 2002, the Overseas Private Investment Corporation ("OPIC")* filed a brief in opposition to a petition for certiorari by the Islamic Republic of Iran. McKesson HBO, Inc., filed a conditional cross-petition for certiorari. The petition was for a writ to the U.S. Court of Appeals for the District of Columbia in the case of *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001). The lengthy history of the litigation in that case is described in the OPIC brief. Briefly, in 1973 McKesson invested in a dairy operation in Iran, insured by OPIC. Following the revolution in Iran, between 1980 and 1982 OPIC paid over $4 million in claims to McKesson for expropriation and an additional $1.4 million for loss of property interests, including lost dividends. Pursuant to the Algiers Accords and implementing executive orders in the United States, McKesson was required to pursue its claims in the Iran-U.S. Claims Tribunal. The Tribunal awarded McKesson $1.4 million, paid from the security account established under the Algiers Accords, but concluded that there had been no expropriation as of January 19, 1981, the date required for the Tribunal's jurisdiction. In 1988, therefore, McKesson renewed this expropriation suit, which had been suspended during the time it was required to pursue its claims at the Tribunal.

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* As described in the OPIC brief, "OPIC is a federal agency that insures United States businesses against political risk in their investments abroad and also finances overseas business through loans and loan guarantees. See generally 22 U.S.C. 2194. . . . OPIC is a corporation wholly owned by the United States Government. It functions as an agency of the Executive Branch, independent of any Cabinet Department but 'under the policy guidance of the Secretary of State.' " [22 U.S.C. 2191].

In three interlocutory appeals to the U.S. Court of Appeals for the District of Columbia Circuit, the court determined that Iran was not entitled to immunity under the Foreign Sovereign Immunities Act because the actions fell under the "commercial activity" exception to immunity under that statute. 28 U.S.C. § 1605(a)(2). *See* discussion in Chapter 10.A.6.b. below. The last of the three appeals affirmed in part and reversed in part a judgment by the district court awarding $20 million in compensatory damages to McKesson, *McKesson Corp. v. Islamic Republic of Iran*, 116 F. Supp. 2d 13 (D.D.C. 2000), remanding the case to the district court with instructions to proceed to trial on petitioner's substantive defense to liability. 271 F.3d 1101 (D.D.C. 2001).

In opposition to Iran's petition for writ of certiorari to the Supreme Court, the United States urged the Court to refuse certiorari of the interlocutory appeal and allow the then-pending litigation to be completed. The OPIC brief described the issues pending in the litigation as follows (internal cross-references deleted):

> The court of appeals . . . considered the district court's grant of summary judgment on liability. The court held that the Treaty of Amity provides respondents with a cause of action under United States law for an expropriation by petitioner. It did not address the district court's alternative holding that customary international law also provides a cause of action. The court of appeals concluded, however, that petitioner had raised a genuine issue of material fact concerning its defense that McKesson was required to "come to the company" [i.e., physically appear at a company's office with a receipt] before receiving its dividends. The court remanded the case for trial on that question.
>
> The court of appeals also upheld the district court's determination of damages. It rejected respondents' claim that the district court should have awarded compound, rather than simple, prejudgment interest. The court of appeals concluded that, although the district court may

have erred in holding that compound interest was never available under international law in such cases, an award of compound interest was not required and the district court did not abuse its discretion by declining to make such an award.

Excerpts below provide OPIC's argument that the U.S.-Iran Treaty of Amity does not provide a cause of action under U.S. law for a U.S. national to sue a foreign sovereign in U.S. federal court for expropriation. Although the court of appeals had mistakenly concluded otherwise, OPIC argued that that issue did not warrant granting of certiorari in this case. Cross-references to other pleadings in the case have been omitted.

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

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[2]a. The court of appeals' 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." Restatement (Third) of the Foreign Relations Law of the United States § 111, cmt. h. (1987). The creation of a private right of action "is analytically distinct from the 'self-execution' concept." Carlos M. Vázquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695, 721 (1995).

As this Court explained in Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829), a treaty is self-executing "whenever it operates of itself without the aid of any legislative provision." But that means only that the treaty is "regarded in courts of justice as equivalent to an act of the legislature." Ibid.; see, e.g., Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("If 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."). Like an Act of Congress, a treaty may establish legal standards or rules of decision in litigation without itself creating a private right of action. And like an Act of

Congress, a self-executing treaty that speaks in terms of individual rights may well create rights that are enforceable by courts in actions that are authorized by or brought under other sources of law.[7]

The Court's decision in Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989), illustrates the point. The Court there ruled that the respondents could not sue Argentina for 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 (footnote omitted). Thus, even if those treaties were self-executing, they did not confer a private cause of action, and the Court held that they therefore did not constitute an express waiver of sovereign immunity under 28 U.S.C. 1605(a)(1).[8]

b. The Treaty of Amity's prohibition against expropriation is self-executing, in the sense that it was intended to establish substantive legal standards without the need for implementing legislation. It states that "[p]roperty of nationals and companies of" one state party to the Treaty "shall not be taken [by the other] except for a public purpose, nor shall it be taken without the prompt payment of just compensation." Treaty of Amity, art. IV, para. 2. That standard is effective of its own force, and imposes a

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[7] For example, the cause of action in Foster (and in United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833), which involved the same treaty) was a common-law claim for ejectment. Likewise, treaty rights may be raised as a defense in a suit brought under another source of law. See, e.g., Vázquez, supra, 89 Am. J. Int'l L. at 721.

[8] The court of appeals' reliance on Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985), is misplaced. The concurring judge correctly observed that a non-self-executing treaty cannot confer a private right of action, but the converse is not necessarily true: A treaty that is self-executing may or may not confer a private right of action. There was no occasion for the concurring judge to consider that question, and his statement equating self-execution with the creation of private rights of action was accordingly dicta. See, e.g., Vázquez, supra, 89 Am. J. Int'l L. at 720–721.

legal obligation on the governments of Iran and the United States. Accord Asakura v. Seattle, 265 U.S. 332, 341 (1924) (provision of an earlier Treaty of Commerce and Navigation between the United States and 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").

The Treaty itself, however, does not create a cause of action for United States citizens to sue Iran in United States courts. By its terms, the Treaty says nothing about private rights of action to enforce its substantive provisions. Thus, the Treaty can create such a cause of action only by implication. In the analogous context of statutes, this Court has exercised great circumspection in recognizing causes of action through that means. See, e.g., Alexander v. Sandoval, 532 U.S. 275, 285–287 (2001); see also Correctional Servs. Corp. v. Malesko, 122 S. Ct. 515, 519 n.3 (2001) (noting that this Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one"); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979) ("The dispositive question remains whether Congress intended to create any such remedy.").

The United States does not interpret the Treaty of Amity to create a private right of action as a matter of United States law for a United States citizen 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. Thus, the Treaty prohibits the uncompensated taking of "[p]roperty of nationals and companies of either High Contracting Party * * * within the territories of the other High Contracting Party." Treaty of Amity, art. IV, para. 2. Equally significant, it refers to "access to courts of justice and administrative agencies" by the "[n]ationals and companies of either High Contracting Party * * * within the territories of the other High Contracting Party." Id., art. III, para. 2. But the Treaty does not confer a right of access to the courts of justice by the nationals and companies of one High Contracting Party to that Party's own courts, whether to bring an action against the other party or for any other purpose. It therefore does not itself create, expressly or by implication, a cause of action allowing

a United States national to bring an action against Iran in a United States court for Iran's expropriation of the United States national's property.[9]

The court of appeals' contrary conclusion is inconsistent with this Court's circumspection concerning implied private rights of action and with the understanding that Congress defines what causes of action are available in United States courts. See Transamerica, 444 U.S. at 24. Because the treaty is focused on a host government's treatment of aliens, it would be particularly odd to infer a cause of action for United States nationals to sue a foreign government in United States courts. There is similarly no reason to think that, in negotiating the Treaty, the United States anticipated that the Treaty could be invoked to create a cause of action allowing Iranian nationals to sue the United States in the courts of Iran. The courts should not infer the creation of reciprocal rights by which United States nationals could sue Iran in the courts of this country.

The court of appeals' interpretation would be detrimental to the broader foreign relations interests of the United States. The United States is a party to numerous Friendship, Commerce, and Navigation (FCN) treaties. If United States courts conclude that FCN treaties generally should be understood to confer private rights of action on United States nationals to sue a treaty partner in federal court in the United States, it is to be anticipated that the courts of this Nation's treaty partners could reach a similar conclusion, and the United States Government could be subject to a variety of new suits in foreign courts (including Iranian courts) by foreign nationals.

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[9] This case does not present the separate question whether the Treaty of Amity should be read to create an implied private right of action for Iranian nationals or companies to sue the United States or other government actors in this country. In any event, the standards applicable to the United States and the States under the Fifth Amendment of the Constitution satisfy the substantive standards of the treaty, and ample remedies exist under United States law for foreign nationals, as for United States citizens, to bring takings claims against the government. See 28 U.S.C. 1491; Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931); see also First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987).

c. Although the court of appeals erred in construing the Treaty of Amity, that error does not warrant review at this time. As McKesson points out), the court of appeals did not address, and petitioner has not sought review of, any alternative basis for respondents' claims. Respondents' complaint identified at least three alternative sources for the cause of action here-customary international law, the Treaty of Amity, and other applicable law, including in particular Iranian law. The district court held that both the Treaty of Amity and customary international law provide a cause of action sufficient to sustain this suit. The court of appeals did not address the district court's alternative conclusion that customary international law provides a cause of action. Neither court below addressed any other possible source of law, including Iranian law.[10]

As a result of the remand ordered by the court of appeals, the district court and court of appeals will have an opportunity to consider further those possible alternative sources of a cause of action, as well as to consider the position of the United States, set forth in this brief, that the Treaty of Amity does not create a private right of action. If judgment is ultimately entered against petitioner at the conclusion of further proceedings, the Court can then decide whether to grant review to consider the existence of a cause of action under each of those various sources of law to the extent they remain in the case.[7]

For example, the cause of action in Foster (and in United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833), which involved the same treaty) was a common-law claim for ejectment. Likewise,

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[10] For reasons similar to those set forth in the text concerning the Treaty of Amity, even more difficult questions are raised by the proposition that an implied right of action may be recognized under customary international law in the absence of an Act of Congress that codifies customary international law and thereby furnishes at least some statutory basis for a cause of action under federal law in United States courts. Nor have the contours of any cause of action under Iranian law been fully developed below. Because the court of appeals did not reach those issues, this Court does not have the benefit of that court's analysis of those questions. And because those alternative bases for a cause of action are not before the Court, we do not address them further here.

treaty rights may be raised as a defense in a suit brought under another source of law. See, e.g., Vázquez, supra, 89 Am. J. Int'l L. at 721.

Cross References

Agreements between AIT and TECRO, **Chapter 3.A.3.(2), 13.A.3.d.(4)**

Regional economic organizations as parties to Inter-American Tropical Tuna, **Chapter 13.A.3d.(1)**

Application of 1949 Convention on Road Traffic, **Chapter 1.C.1.**

Applicability of Geneva Conventions to detainees, **Chapter 18.A.4.a.**

Violation of Agreed Framework, **Chapter 18.C.3.**

U.S. decision not to become member of International Criminal Court, **Chapter 3.C.2.**

Arms control treaties, **Chapter 18.B.**

International Law Commission concerning reservations, **Chapter 7.A.2.**

Settlement of claims under Agreement with Vietnam; Treaty of Peace with Japan, **Chapter 8.B.2.; 8.B.4.a.**

Bilateral tax treaty with Canada and enforcement of foreign tax claims in U.S. courts, **Chapter 15.A.4.**

Relationship between treaty and statute, **Chapter 10.A.6.d.(1); Chapter 15.A.4.**

Chapter 5

Federal Foreign Affairs Authority

A. FOREIGN RELATIONS LAW OF THE UNITED STATES

1. Agreement with Russia Concerning Documentation of U.S.-Soviet Relations

In February 2002 Secretary of State Colin L. Powell and Russian Minister of Foreign Affairs Igor Ivanov reached agreement on publication of a joint compilation of documents related to the development of Soviet-American relations during the period from 1969 to 1976. A press release from the Department of State, dated December 13, 2002, reported that consultations concerning implementation had been held on December 10–12, 2002, following a similar set of talks held in Moscow in June 2002.

The full text of the press release is available at *www.state.gov/r/pa/prs/ps/2002/15936pf.htm*.

2. Alienage Diversity Jurisdiction

On April 17, 2002, the U.S. Supreme Court held that a foreign corporation organized under the laws of the British Virgin Islands was a "citize[n] or subjec[t] of a foreign state" for purposes of federal jurisdiction under the alienage diversity statute, resolving a conflict among the U.S. circuit courts of appeals. *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88 (2002). The alienage diversity statute, 28 U.S.C. § 1332(a)(2), provides for jurisdiction in

federal district courts of certain civil actions "between . . . citizens of a State and citizens or subjects of a foreign state." The statute is based on Article III, § 2 of the U.S. Constitution, establishing the judicial power of the United States to include controversies "between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."

In this case, the U.S. District Court for the Southern District of New York had granted summary judgment in favor of Chase Manhattan Bank, which had sued Traffic Stream for breach of an indenture agreement providing for the issuance of secured debt to finance Traffic Stream's business ventures. *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 86 F. Supp. 2d 244 (S.D.N.Y. 2000). On appeal, the U.S. Court of Appeals for the Second Circuit *sua sponte* raised the question of subject-matter jurisdiction and dismissed the case. 251 F.3d 334 (2d Cir. 2001). Relying on its precedent in *Matimak Trading Co. v. Khalily,* 118 F.3d 76 (2d Cir. 1997), the court of appeals found that because Traffic Stream was a citizen of an Overseas Territory and not an independent foreign state, jurisdiction was lacking.

The Supreme Court granted certiorari "[b]ecause the Second Circuit's decision conflicts with those of other Circuits . . . and implicates serious issues of foreign relations." 536 U.S. at 99. The United States had filed a brief as *amicus curiae* in support of plaintiff's petition. *See* discussion in *Digest 2001* at 227–235.

On November 20, 2002, in accordance with the Supreme Court's April 2002 decision on the merits, the court of appeals affirmed the district court's judgment in favor of Chase Manhattan Bank. 52 Fed. Appx. 528 (2d Cir. 2002).

Excerpts below from the Supreme Court opinion explain its holding in the case. Footnotes have been deleted.

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The argument that the status of the [British Virgin Islands ("BVI")] renders the statute inapplicable begins by assuming that

Traffic Stream, organized under BVI law, must be a citizen or subject of the BVI alone. Since the BVI is a British Overseas Territory, unrecognized by the United States Executive Branch as an independent foreign state, it is supposed to follow that for purposes of alienage jurisdiction Traffic Stream is not a citizen or subject of a "foreign state" within the meaning of [28 U.S.C.] § 1332(a)(2).

Even on the assumption, however, that a foreign state must be diplomatically recognized by our own Government to qualify as such under the jurisdictional statute (an issue we need not decide here), we have never held that the requisite status as citizen or subject must be held directly from a formally recognized state, as distinct from such a state's legal dependency. On the contrary, a consideration of the relationships of the BVI and the recognized state of the United Kingdom convinces us that any such distinction would be entirely beside the point of the statute providing alienage jurisdiction.

* * * *

The relationship between the BVI's powers over corporations and the sources of those powers in Crown and Parliament places the United Kingdom well within the range of concern addressed by Article III [of the U.S. Constitution] and § 1332(a)(2). The United Kingdom exercises ultimate authority over the BVI's statutory law, including its corporate law and the law of corporate charter, and it exercises responsibility for the BVI's external relations. These exercises of power and responsibility point to just the kind of relationship that the Framers believed would bind sovereigns "by inclination, as well as duty, to redress the wrongs" against their nationals, 2 Elliot's Debates 493 (J. Wilson). See J. Jones, British Nationality Law and Practice 288 (1947) ("It is the practice of His Majesty's Government in the United Kingdom to protect, as against foreign Powers, . . . corporations owing their existence to the law in force in the United Kingdom and colonies"). Any doubters may consult the United Kingdom's own filings in this matter and others comparable, which express apprehension that expulsion of corporations like Traffic Stream from federal courts would cloud investment opportunity and raise the sort of

threat to "the security of the public tranquility" that the Framers hoped to avoid. . . .

* * * *

Traffic Stream's alternative argument is that BVI corporations are not "citizens or subjects" of the United Kingdom. Traffic Stream begins with the old fiction that a corporation is just an association of shareholders, presumed to reside in the place of incorporation, see, *e.g.*, *Tugman*, 106 U.S., at 120–121, with the result that, for jurisdictional purposes, a suit against the corporation should be understood as a suit against the shareholders, see *id.*, at 121. Traffic Stream proceeds to read the British Nationality Act, 1981, as a declaration by the United Kingdom that BVI residents are not its citizens or subjects, but mere "nationals," without the rights and privileges of citizens or subjects, such as the right to travel freely within the United Kingdom. . . .

The . . . outdated legal construct of corporations as collections of shareholders linked by contract . . . [is] a view long since replaced by the conception of corporations as independent legal entities. . . .

But the argument's more significant weakness is its failure to recognize that jurisdictional analysis under the law of the United States is not ultimately governed by the law of the United Kingdom, whatever that may be. While it is perfectly true that "every independent nation [has the inherent right] to determine for itself . . . what classes of persons shall be entitled to its citizenship," *United States* v. *Wong Kim Ark*, 169 U.S. 649, 668, 42 L. Ed. 890, 18 S. Ct. 456 (1898), our jurisdictional concern here is with the meaning of "citizen" and "subject" as those terms are used in § 1332(a)(2). In fact, we have no need even to decide whether Traffic Stream's reading of the British Nationality Act is wrong, as the United Kingdom says it is, but only whether the status Traffic Stream claims under the Nationality Act would so operate on the law of the United States as to disqualify it from being a citizen or subject under the domestic statute before us here. We think there is nothing disqualifying.

* * * *

Because our opinion accords with the positions taken by the Governments of the United Kingdom, the BVI, and the United States, the case presents no issue of deference that may be due to the various interested governments. It is enough to hold that the United Kingdom's retention and exercise of authority over the BVI renders BVI citizens, both natural and juridic, "citizens or subjects" of the United Kingdom under 28 U.S.C. § 1332(a). We therefore reverse the judgment of the Court of Appeals.

* * * *

3. Availability of Intelligence and Foreign Relations Information

On June 20, 2002, the U.S. Supreme Court dismissed a claim brought by the American widow of a foreign dissident alleging that concealment of information by U.S. Government officials denied her access to the courts, which could have saved the dissident's life. *Christopher v. Harbury*, 536 U.S. 403 (2002). The United States brief as *amicus curiae*, filed in the U.S. Supreme Court in January 2002, described the facts of the case as follows:

> Harbury, a United States citizen, was the widow of Efrain Bamaca-Velasquez, a Guatemalan rebel leader. In March 1992, the Guatemalan army reported that Bamaca committed suicide during a battle. Harbury alleged, however, that Bamaca was captured and detained by members of the Guatemalan military, including Central Intelligence Agency ("CIA") "assets" allegedly paid by the CIA to obtain information about the rebel forces. She further alleged that Bamaca's captors tortured him and then executed him around September 1993. Harbury claimed that, in early 1993, she learned from an escaped prisoner that Bamaca was still alive and being tortured. During 1993, she contacted various State Department officials asking for information about her husband's status. Harbury alleges that although in each case the official promised to look into the matter, she received no information. Subsequent communications from State

Department and National Security Council ("NSC") officials, she alleges, conveyed the impression that they knew nothing for sure but were seeking information and would keep her informed. Harbury claimed, however, that the government officials knew all along that Bamaca had been killed by the Guatemalan army. In particular, she alleged that, while Bamaca was still alive, U.S. federal government officials made "fraudulent statements and intentional omissions" that prevented her from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's true plight through the media."

Excerpts below from the Supreme Court opinion dismissing the claim address the separation of powers issues raised by the case. Internal citations have been omitted.

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* * * *

The particular facts of this case underscore the need for care on the part of the plaintiff in identifying, and by the court in determining, the claim for relief underlying the access-to-courts plea. The action alleged on the part of all the Government defendants (the State Department and NSC defendants sued for denial of access and the CIA defendants who would have been timely sued on the underlying claim but for the denial) was apparently taken in the conduct of foreign relations by the National Government. Thus, if there is to be judicial enquiry, it will raise concerns for the separation of powers in trenching on matters committed to the other branches. Since the need to resolve such constitutional issues ought to be avoided where possible, the trial court should be in a position as soon as possible in the litigation to know whether a potential constitutional ruling may be obviated because the allegations of denied access fail to state a claim on which relief could be granted.

Respondent-plaintiff in this case alleges that Government officials intentionally deceived her in concealing information that her husband, a foreign dissident, was being detained and tortured

in his own country by military officers of his government, who were paid by the Central Intelligence Agency. One count of the complaint, brought after the husband's death, charges that the official deception denied respondent access to the courts by leaving her without information, or reason to seek information, with which she could have brought a lawsuit that might have saved her husband's life. The issue is whether this count states an actionable claim. We hold that it does not, for two reasons. As stated in the complaint, it fails to identify an underlying cause of action for relief that the plaintiff would have raised had it not been for the deception alleged. And even after a subsequent, informal amendment accepted by the Court of Appeals, respondent fails to seek any relief presently available for denial of access to courts that would be unavailable otherwise.

* * * *

The Court did not find it necessary to rule on issues raised by the United States concerning the particular problems with attempting to bring a claim based on a right to foreign relations and intelligence information. Excerpts below from the U.S. brief address those issues. Footnotes and internal cross-references have been deleted.

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* * * *

ARGUMENT
RESPONDENT HAS NO CONSTITUTIONAL RIGHT, LET ALONE A CLEARLY ESTABLISHED RIGHT, TO FORCE CANDID DISCLOSURES OF FOREIGN AFFAIRS AND INTELLIGENCE INFORMATION

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized an implied private cause of action for damages against federal officers in their personal capacities, where they are alleged to have violated constitutional rights under color of their federal authority. Officials sued under *Bivens*, however, enjoy qualified immunity unless their

conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

* * * *

C. The Existence Of An Alternative Remedial Scheme For Obtaining Information From The Federal Government Precludes Inference Of A *Bivens* Action.

The existence of statutory avenues for obtaining information from the government not only obviates the need to constitutionalize this area of the law, but *a fortiori* demonstrates that there is no need for the Court to infer a *Bivens* remedy for any constitutional right that may exist. This Court has consistently refused to infer a *Bivens* remedy where Congress already has established an alternative statutory mechanism for addressing the relevant problem. See, *e.g.*, *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515, 520 (2001).

* * * *

A *Bivens* remedy should not be inferred here because Congress has created a comprehensive framework of statutory mechanisms for seeking information from the federal government. Of primary relevance, the Freedom of Information Act establishes procedures for any member of the public to obtain copies of non-exempt agency documents and records, and embodies "a general philosophy of full agency disclosure." *Department of Air Force* v. *Rose*, 425 U.S. 352, 360 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). . . .

The Privacy Act of 1974, 5 U.S.C. 552a (allowing access to governmental records pertaining to the requesting individual), the Government in the Sunshine Act, 5 U.S.C. 552b (open meeting requirements), and the Federal Advisory Committee Act, 5 U.S.C. App. at 1 (requiring access to meetings and records of federal advisory committees), provide additional mechanisms for obtaining information about governmental programs and policies. . . . Each statute also contains restrictions on the disclosure of privileged and classified information, including the types of foreign relations and intelligence information sought by respondent here. See 5

U.S.C. 552(b)(1), (3) and (7); 5 U.S.C. 552a(k)(1), (2) and (3); 5 U.S.C. 552b(c)(1), (3) and (7); 5 U.S.C. App. § 10(b) and (d) . . .

* * * *

In short, respondent was never "a plaintiff in search of a remedy." *Malesko*, 122 S. Ct. at 523. To the contrary, she at all times had available to her "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations," *Bush*, 462 U.S. at 388, and that she acknowledges was capable of providing her all of the information to which she was legally entitled—if she had invoked the procedures in a timely manner.

Finally, supplementation of that elaborate and interlocking system of disclosure obligations would be doubly inappropriate here, because respondent predicates her claim for constitutional relief on an alleged intentional withholding of information pertaining to foreign affairs and intelligence operations. This Court will not infer a *Bivens* remedy where there are "special factors counselling hesitation." *Schweiker*, 487 U.S. at 423; see also *Bivens*, 403 U.S. at 396–397. In *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273–274 (1990), this Court suggested that matters pertaining to foreign affairs and foreign activities could be special factors counseling hesitation in inferring a *Bivens* remedy, in light of the judiciary's traditional reluctance to delve into such matters. For similar reasons, this Court has declined to infer a *Bivens* remedy for actions incident to military service because "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *United States* v. *Stanley*, 483 U.S. 669, 683 (1987).

The Executive Branch actions for which respondent seeks a judicially imposed *Bivens* remedy all pertain to the withholding of and communications about the United States' relations with a foreign government, intelligence operations and activities between the two governments, the existence of alleged CIA operatives or paid informants within a foreign government, and the knowledge of United States officials about the foreign government's treatment and interrogation of a foreign national engaged in insurrection against a recognized foreign government. Few matters could be less appropriate for judicial superintendence. That fact would have

been obvious had respondent filed a timely FOIA request or attempted a timely lawsuit. The result should be no different because respondent instead has asked the courts to mint a novel constitutional tort.

* * * *

4. Reciprocal Access to National Courts

On October 29, 2002, the U.S. Court of Federal Claims dismissed a suit against the United States for lack of subject-matter jurisdiction. *Ferreiro v. U.S.*, 54 Fed. Cl. 274 (2002). Plaintiffs in the suit, Cuban nationals living in Cuba, sought pension benefits not paid since the imposition of the Cuban embargo. Plaintiffs and others they represent were Cuban nationals enlisted in the U.S. Armed Forces during World War II and therefore eligible to participate in the Civil Service Retirement System. As explained in the opinion of the Court of Claims:

> Plaintiffs' benefits have not been paid, escrowed, or accounted for since the United States imposed the Cuban Embargo in 1963. All government agencies owing monies to Cuban Nationals suspended pension, social security, and veterans' benefits pursuant to United States Department of the Treasury ("Treasury") regulations. In a letter dated February 10, 1964, the United States Civil Service Commission announced:
>
> > It has now been determined that there is no reasonable assurance that a payee living in Cuba will actually receive United States Government checks or be able to negotiate them for full value. Therefore, since the United States Treasury Department Regulations now prohibit payments to persons residing in Cuba, Civil Service annuity payments are being suspended. This stoppage of payments applies to all Civil Service annuitants and survivor-annuitants residing in Cuba including those whose civil Service annuity checks were being delivered to an address

> outside Cuba. This means that any checks to which you were entitled which were dated after January 2, 1963, will not be issued.
>
> If payments to Cuban residents are resumed at some time in the future, the Civil Service annuity benefits which were withheld will be paid provided all conditions for entitlement to such benefits have been met.

Plaintiffs argued that their suit for past pension benefits was authorized under 28 U.S.C. § 2502. That statute provides that "[c]itizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise within such court's jurisdiction."

On October 15, 2002, the U.S. Department of State had responded to a court order requesting an official statement addressing the issue of whether the Cuban government accords U.S. citizens the right to fully prosecute claims against the Cuban government in the Cuban courts. In determining that it lacked subject-matter jurisdiction, the court relied on the State Department opinion and its conclusion:

> It is the view of this court that at this juncture it is prudent to rely on the official opinion of the United States Department of State dated October 15, 2002, which is attached to this judicial opinion in its entirety. The State Department is uniquely situated to render an official determination on the issue of whether the Cuban government accords United States citizens the right to fully prosecute claims against the Cuban government in the Cuban courts. Accordingly, this court will not undertake to conduct an evidentiary hearing on the matter, nor will it consider the parties' arguments and proffered evidence in this regard, as it appears to be piecemeal, disjointed, and wholly inadequate for this court to render a thorough and correct decision on the reciprocity issue.

> That being said, this court has carefully read and fully considered the official statement from the United States Department of State, dated October 15, 2002. In this opinion the State Department concludes:
>
> > While the Cuban government tightly controls information in Cuba, the Department has reviewed the information available to it on this subject. Based on this information, the Department has concluded that any right of a U.S. citizen to pursue a claim against the Cuban government in Cuban courts is subject to the political interference of the Cuban government and, thus, that there are serious impediments to the ability of a U.S. citizen to pursue effectively a lawsuit against the Cuban government.
>
> October 15, 2002 opinion of the United States Department of State at 1.
>
> The official opinion from the State Department is both comprehensive, supported by facts and empirical evidence, and well-reasoned. There is no anecdotal evidence, such as that previously supplied to the court by the parties, which could supplant the opinion of the State Department. Accordingly, this court must conclude that it lacks jurisdiction over this matter pursuant to 28 U.S.C. § 2502, inasmuch as, based on the official opinion of the State Department relied upon by this court, there exist serious impediments to the ability of a U.S. citizen to pursue effectively a lawsuit against the Cuban government.

Additional excerpts, provided below, from the letter from Daniel W. Fisk, Deputy Assistant Secretary of State for Western Hemisphere Affairs, October 15, 2002, provide the reasons for the Department's conclusions on which the court relied.

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

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As stated in the Department's most recent (2001) Report on Human Rights Practices in Cuba, "Cuba is a totalitarian state controlled by President Fidel Castro . . . [who] exercises control over all aspects of life through the Communist Party and its affiliated mass organizations, the government bureaucracy headed by the Council of State, and the state security apparatus."[1] There is no independent judiciary or judicial system in Cuba today. The Cuban judicial system is subject to the political control of the Cuban government. While it appears that at least some Cuban courts have jurisdiction to hear a claim against the Cuban government brought by any individual (including U.S. citizens), the Human Rights Report notes that the Cuban constitution "explicitly subordinates the courts to the [National Assembly of People's Power] and the Council of State, which is headed by President Castro."[2] The Department's Human Rights Report also notes that the "subordination of the courts to the Communist Party, which the Constitution designates as the superior directive force of society and the State, further compromises the independence of the judiciary."[3] In addition, article 10 of the Cuban constitution provides that "all organs" of the Cuban government, including the courts, "are obliged to strictly observe socialist legality and to ensure respect for it in the life of the entire society."[4] Thus, political control over the Cuban judiciary is accomplished both by functional oversight and by a substantive legal requirement.

Cuban judicial decision-making is compromised by the political influence of the Cuban government. The Human Rights Report notes that the "panels composed of a mix of professionally certified and lay judges" preside over civilian courts at the municipal, provincial and supreme court levels.[5] Lay judges are selected, in

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[1] Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, country Reports on Human Rights Practices—Cuba, at 1, (Apr. 2002) available at http://www.state.gov/g/drl/rls/hrrpt/2001/wha/ [hereinafter "Human Rights Report".

[2] Id.

[3] *Id.* at 7.

[4] Constitucion de Cuba, art. 10, *translated in* constitutions of the countries of the World: Republic of Cuba 4 th ed. Gisbert Flanz, 2000.

[5] Human Rights Report, *supra* note 1, at 7.

part, for their political obedience to the Cuban government. Since juries are not used in Cuba, these mixed panels of professional judges and lay judges are the decision-makers. Within Cuba, the United States is the subject of constant antagonism and vitriol expressed by the Cuban government. It is within this environment that both professional judges and lay judges must make decisions. The Department believes that the professional and lay judges considering a claim by a U.S. citizen against the Cuban government are inherently subject to constant governmental pressure, without any of the safeguards that typically protect an independent judiciary.

Cuban lawyers are also subject to the control and political influence of the Cuban government. Cuban laws have been used to deprive certain individuals who have criticized the Cuban government or defended human rights cases of their ability to practice law in Cuba.[6] In the Human Rights Report, the Department concluded that "the control that the Government [of Cuba] exerts over the livelihood of members of the state—controlled lawyers' collectives compromises their ability to represent clients, especially when they defend persons accused of state security crimes."[7] The Department also noted in the Human Rights Report that "[a]ttorneys have reported reluctance to defend those charged in political cases due to fear of jeopardizing their own careers."[8] Given the constant hostility articulated by the Cuban government towards the United States, representing a U.S. citizen in a case against the Cuban government appears to present the same governmental intimidation and offers the same career hazard.

Treatment of U.S. citizens by the Cuban government in the past has evinced a general disregard for their rights. For example, when the Castro regime took power, the Cuban government took

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[6] The Inter-American Commission reported that "attorneys who prepare and sign briefs with positions critical of the situation of the nation or the profession" have been called to meetings to be prohibited from practicing law. Cuba, Inter-Am. C.H.R. 677, 693, 0EA/Ser.L/v/II.114 Doc. 5 rev 1 (2002).

[7] Human Rights Report, supra note 1, at 7.

[8] *Id.*

into state ownership most of the property in that country owned by the United States and its citizens.[9] The Foreign Claims Settlement Commission (FCSC) noted in 1972 that "[n]o provision was made by the Cuban Government for the payment of compensation for such property as required under generally accepted rules of international law."[10] In fact, the 5,911 claims of U.S. citizens and corporations certified by the FCSC, most resulting from these nationalizations, remain unresolved today. As valued by the U.S. Foreign Claims Settlement Commission (FCSC), these claims today are worth approximately $6.3 billion, including accrued interest.

Certain U.S. citizens have been subjected to gross mistreatment by the Cuban judicial system, as documented by the FCSC. For example, Cuba tried, convicted and executed Howard F. Anderson in 1961 for alleged crimes against the Cuban government. The FCSC determined that the "lack of opportunity for defense attorneys to prepare arguments for the trial and subsequent appeal, the actions of the prosecutor at the trial, the changing of the crime charged by the appeals court, the inconsequential acts of Mr. Anderson who was not a member of any group acting against the Cuban Government, and the animosity toward Americans resulting from the Bay of Pigs," resulted in a "denial of justice by the Government of Cuba."[11] Similarly, the FCSC concluded that the execution of Robert Otis Fuller in 1961 "for the same crime for which two Cuban nationals were sentenced to thirty years imprisonment, was clearly a discrimination directed to persons alien to the Republic of Cuba, being disproportionate to the punishment meted out to the Cuban nationals," and therefore was "a denial of justice."[12] While somewhat dated examples, they remind us of the over forty-year animosity that has been expressed both in and

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[9] U.S. For. Claims Settlement Comm'n, Final Report of the Cuban Claims Program 69 (1979), *reprinted from* U.S. For. Claims Settlement Comm'n, Annual Report to Congress (1972).

[10] *Id.*

[11] In the Matter of the Claim of Dorothy McCarthy, et al., U.S. For. Claims Settlement Comm'n, Dec. No. CU-6244, at 8 (1971).

[12] In the Matter of the Claim of Jennie Fuller, et al., U.S. For. Claims Settlement Comm'n, Dec. No. CU-6199, at 9 (1971).

out of the Cuban courtroom. We have no reason to believe that current Cuban judicial processes would be less subject to the political requirements of the current Cuban government.

5. Foreign Policy Issues in U.S. Legislation

On September 30, 2002, President George W. Bush signed into law H.R. 1646, the Foreign Relations Authorization Act, Fiscal Year 2003. Pub. L. No. 107–228, 115 Stat. 350. In doing so, he noted that a number of provisions in the Act "impermissibly interfere with the constitutional functions of the presidency in foreign affairs." In his statement, set forth below, the President indicated the manner in which the provisions would be construed or implemented in order to preserve executive branch prerogatives.

The full text of the statement is available at 38 WEEKLY COMP. PRES. DOC. 1658 (Oct. 2, 2002).

I have today signed into law H.R. 1646, the "Foreign Relations Authorization Act, Fiscal Year 2003." This Act authorizes appropriations, and provides important new authorities, for diplomatic and related activities of the U.S. Government. Many provisions in the Act will strengthen our ability to advance American interests around the globe, including nonproliferation of weapons of mass destruction, and to meet our international commitments, including those to the United Nations. Regrettably, the Act contains a 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 executive branch shall construe as advisory the provisions of the Act, including sections 408, 616, 621, 633, and 1343(b), that purport to direct or burden the conduct of negotiations by the executive branch with foreign governments, international organizations, or other entities abroad or which purport to direct

executive branch officials to use the U.S. voice and vote in international organizations to achieve specified foreign policy objectives. Such provisions, if construed as mandatory rather than advisory, would impermissibly interfere with the President's constitutional authorities to conduct the Nation's foreign affairs, participate in inter-national negotiations, and supervise the unitary executive branch.

The executive branch shall also construe provisions in the Act that mandate submission of information to the Congress or the public, such as sections 204, 215, 603, 613(b), 615 and 1602, in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair the foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. The Secretary of State will, of course, continue as a matter of comity to keep the Congress appropriately informed of the Nation's foreign affairs activities.

Several provisions of the Act, including sections 650, 1205(d)(5), and 1501(7) call for executive branch officials to submit to the Congress recommendations for legislation. The executive branch shall implement these provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend to the Congress such measures as the President judges necessary and expedient.

Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct 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.

The executive branch shall implement sections 325 and 687 in a manner consistent with the equal protection requirements of the Due Process Clause of the Fifth Amendment to the Constitution.

Section 505 of the Act excludes U.S. Government employees abroad assigned to duty as correspondents for the Voice of America (VOA) from the statutory responsibilities of the Secretary of State for security of certain U.S. Government personnel abroad and of chiefs of U.S. missions for direction of such personnel. Pursuant to the constitutional authority of the President to conduct the Nation's foreign affairs and to supervise the unitary executive branch, the Secretary of State may provide such direction as may be necessary with respect to the security and conduct of U.S. Government employees abroad assigned to duty as VOA correspondents.

Section 604 purports to require the imposition of certain sanctions on the Palestinian Liberation Organization or Palestinian Authority based on the determinations that the President makes or fails to make in the report provided for in section 603. Although a waiver authority is also provided, I note that some of these sanctions, in particular with respect to visas and the status of representational offices, bear on the President's power with respect to the timing and nature of diplomatic communications. Accordingly, I shall construe these requirements in a manner consistent with my constitutional responsibilities for the conduct of foreign affairs.

Section 645 of the Act purports to require the President to implement a law through a particular subordinate officer in the Department of Commerce. The executive branch shall implement this provision in a manner consistent with the President's authority to supervise the unitary executive branch, including the authority to direct which officers in the executive branch shall assist the President in faithfully executing the law.

Section 686 makes seven additional plaintiffs with judgments against Iran eligible for payments under the Victims of Trafficking and Violence Protection Act of 2000. While U.S. victims of international terrorism are deserving of compensation in accordance with the law, the continued piecemeal legislative approach that addresses some victims and not others is neither equitable nor practicable. The Congress should develop a comprehensive proposal that provides compensation for all victims, following the principles my Administration outlined in June of this year. Such a

proposal should not draw upon blocked assets to fund victim compensation, so as to preserve the prerogatives of the President in the area of foreign affairs.

* * * *

Section 1206 could be misconstrued to imply a change in the "one China" policy of the United States when, in fact, that U.S. policy remains unchanged. To the extent that this section could be read to purport to change United States policy, it impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs.

Section 1406 of the Act requires that actions to remove items from the munitions list be subject to reprogramming notifications to committees of Congress. By its plain terms, this provision does not subject such actions to any committee approval requirements, which would be impermissible under the constitutional separation of powers, and accordingly, the executive branch shall so implement it.

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.

6. American Institute in Taiwan

On April 16, 2002, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the decision of the District Court for the District of Columbia dismissing a *qui tam* action under the False Claims Act against the American Institute in Taiwan ("AIT") for lack of jurisdiction. *Wood, ex rel. United States of America, v. The American Institute In Taiwan*, 286 F.3d 526, 351 (D.C. Cir. 2002). The United States had filed a brief in the case as defendant/appellee, explaining that the

appellant was a political appointee who had served as the Managing Director and Chairman of the Board of Trustees of AIT. *See* discussion and excerpts of brief in *Digest 2001* at 235-241. The court of appeals held that AIT was immune from suit under the False Claims Act as an agency or instrumentality of the United States, that Congress had not waived AIT's sovereign immunity, and that the district court order's refusal to grant additional discovery relative to AIT's sources of funding was not an abuse of discretion.

B. CONSTITUENT ENTITIES

Northern Mariana Islands: Control of "Submerged Lands"

On December 2, 2002, the United States filed in the U.S. District Court for the District of the Northern Mariana Islands a Cross Motion for Summary Judgment and Memorandum in Support in *Commonwealth of the Northern Mariana Islands v. U.S.*, No. CV 99-0028 (D. N. Mar. I.). In this case, the Commonwealth of the Northern Mariana Islands ("CNMI") claimed sovereignty, ownership, and exclusive right to control submerged lands and marine resources underlying a 12-mile territorial sea, as well as a 200-mile exclusive economic zone, as measured from straight archipelagic baselines. The U.S. motion sought dismissal of the complaint filed by the CNMI and a judgment decreeing that, as of November 4, 1986, CNMI legislation purporting to exert sovereignty and control over the submerged lands and marine resources at issue were null and void under the Supremacy Clause of the U.S. Constitution, Sections 101 and 102 of the Covenant To Establish A Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant"), and Articles XI and XIV of the CNMI Constitution, because they conflict with the United States' ownership and paramount right to control and regulate the submerged lands and marine resources seaward of the Commonwealth's low-water mark.

The United States became Trustee for the former Trust Territory of the Pacific Islands ("TTPI"), including what is now the CNMI, pursuant to an agreement with the United Nations Security Council on July 18, 1947. The United States entered into negotiations on the future status of the TTPI in the 1960s. In 1970 the Congress of Micronesia, composed of representatives of the six administrative districts of the TTPI, including the Northern Mariana Islands, rejected a U.S. proposal to enter into a commonwealth relationship of "permanent association" with the United States. The TTPI elected instead to form a looser, more autonomous relationship of "free association." In 1972 the United States agreed to hold separate negotiations with the Northern Mariana Islands directed toward a closer and more permanent political relationship with the United States. On November 3, 1986, President Ronald Reagan declared that the U.N. Trusteeship was terminated with respect to the Northern Mariana Islands, as well as to the Marshall Islands and the Federated States of Micronesia. 51 Fed. Reg. 40,399 (Nov. 7, 1986)). The President proclaimed that, as of November 4, 1986, "the Commonwealth of the Northern Mariana Islands in political union with and under the sovereignty of the United States of America is fully established." *Id*. A discussion of the history of the relationship between the United States and what came to be the CNMI, including discussions of the status of the submerged lands at issue, is set forth in the U.S. brief at 1–17.

Excerpts from the U.S. brief set forth below provide the views of the United States that

> the United States is the owner of, and has paramount authority over, the submerged lands lying seaward of the Commonwealth's coastlines and inland waters, because the CNMI, in Covenant § 101, entered into a sovereignty relationship with the United States, like every other U.S. state and territory, and that relationship officially became effective on November 4, 1986. . . . [W]herever a sovereignty relationship exists between the United States

> and a state or territory abutting oceanic waters, the United States' paramount authority over submerged lands seaward of the low water mark, as a matter of U.S. law, attaches as an incident of that sovereignty.
>
> Internal cross-references to other pleadings and supporting documents have been omitted.
>
> The full text of the U.S. motion and supporting memorandum are available at *www.state.gov/s/l/c8183.htm*.

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* * * *

A. Pursuant to Section 101 of the Covenant the United States Acquired the Paramount Rights to the Submerged Lands and Marine Resources Underlying the Oceanic Waters Surrounding the CNMI's Coastlines When the U.N. Trusteeship Agreement Terminated in November 1986

. . . [T]he Covenant controls the rights, responsibilities, and political relationship between the U.S. and the CNMI. Section 101 of the Covenant specifies that the United States is sovereign over the CNMI. As an incident of external sovereignty, the United States, under U.S. law, acquired ownership and paramount rights in the submerged lands and marine resources seaward of the CNMI's low-water mark at the termination of the U.N. Trusteeship.

Under federal constitutional law, paramount power over submerged lands is vested in the United States as a necessary element of national external sovereignty. In *United States v. California*, 332 U.S. 19 (1947), the Supreme Court rejected the State of California's claim to ownership of the oceanic submerged lands within three miles of the coastline. It went on to hold that the protection and control of adjacent seas is a function of national external sovereignty which, under the U.S. constitutional system, requires that paramount rights over the submerged lands underlying adjacent oceanic waters and their natural resources be vested in the federal government. 332 U.S. at 34. The Court also made clear that "the Federal Government has the paramount right and power to determine in the first instance when, how, and by what

agencies . . . the oil and other resources of the soil of the marginal sea . . . may be exploited." 332 19 U.S. at 29.[16]

In *United States v. Texas*, 339 U.S. 707 (1950), a similar submerged lands case involving lands underlying the Gulf of Mexico, the Supreme Court concluded that even if Texas, prior to admission to statehood, had full ownership and sovereignty over the adjacent seas and seabed, such ownership could not survive the State's admission to the Union:

> It is said that . . . the sovereignty of the sea can be complete and unimpaired no matter if Texas owns the oil underlying it. . . . Yet . . . once the low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. . . . If the property, whatever it may be, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it.

339 U.S. at 719.[17]

The paramountcy doctrine applies to U.S. territories to the same extent as to States. In 1958, long before the NMI representatives commenced negotiations with the United States over the NMI's future political status, the Solicitor of the U.S. Department of the Interior ("DOI") issued a legal opinion addressing the applicability of the paramount rights doctrine to unincorporated territories that,

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[16] In subsequent litigation between the federal government and the States of Louisiana and Texas, the Court extended the *California* doctrine from the three-mile belt to the outer continental shelf ("OCS"). In *United States v. Louisiana*, 339 U.S. 699, 704 (1950), the Court explained that, with respect to the OCS, "[t]he problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area."

[17] In *United States v. Maine*, 420 U.S. 515 (1975), the Supreme Court rejected a claim by Atlantic Coast states that they had acquired rights to the seabed which had survived the formation of the Union, thereby reiterating the continued vitality of the paramountcy doctrine.

like the CNMI, are subject to U.S. sovereignty. In that opinion,[18] the DOI Solicitor declared that 48 U.S.C. § 1421 *et seq*., a statute that transferred to the Government of Guam "all property, real or personal," previously used by the "naval government in Guam in the administration of the civil affairs of the inhabitants of Guam," and "all other property, real and personal, not reserved by the [U.S.] President," did not convey to the Guamanian government title to the oceanic submerged lands adjacent to Guam. Although acknowledging that the paramount rights doctrine had previously been applied in cases only involving states and incorporated territories, the Solicitor concluded that the doctrine must also apply to unincorporated territories such as Guam "since to hold otherwise would result in the granting to such a territory of powers or rights greater than those of the incorporated territories, which would be unreasonable."[19]

Consistent with the Interior Solicitor's conclusions, the Ninth Circuit more recently made clear that the federal paramountcy doctrine is not confined to oceanic submerged land disputes between U.S. states and the Federal Government, but extends to *all* cases in which any Plaintiff asserts a claim of ownership in submerged lands underlying the ocean abutting an area over which the U.S. has sovereignty. *Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989) ("*Gambell Ill*"). Indeed, in *Gambell III*, the

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[18] "Rights Of Abutting Upland Property Owners To Claim Title To Reclaimed Land Produced by Filling On Tidelands And Submerged Lands Adjacent To The Territory Of Guam," 65 Int. Dec. 193 (1958).

[19] *Id*. at 195. The United States believes that the federal paramountcy doctrine, as a matter of U.S. law, bars the CNMI's claim of ownership of oceanic submerged lands, by virtue of the provisions of Covenant § 101 vesting sovereignty over the CNMI in the United States, as of November 4, 1986. But the applicability of the federal paramountcy doctrine to the CNMI's claim to oceanic submerged lands is also reinforced by Covenant § 502(a)(2) which makes applicable to the CNMI those "laws of the United States" which are "applicable to Guam and which are of general application to the several States as they are applicable to the several states." Because, as explained above, the federal paramountcy doctrine is "applicable to Guam" and is of "general application to the several states," it applies equally to the Commonwealth pursuant to Section 502(a)(2) of the Covenant.

Ninth Circuit rejected a contention that the principles enunciated in the Supreme Court's paramountcy cases did not apply in cases where the plaintiff is not a U.S. state, holding that the fact that the paramountcy cases involved States rather than Alaskan natives was "a distinction without a difference. . . ." 869 F.2d at 1276. Similarly, in *Native Village of Evak v. Trawler Diane Marie. Inc.*, 154 F.3d 1090 (9th Cir. 1998), the Ninth Circuit unequivocally declared:

> the paramountcy doctrine is *not* limited merely to disputes between the national and state governments. *Any claim of sovereign right or title over the ocean by any partv other than the United States*, including Indian tribes, is equally repugnant to the principles established in the paramountcy cases.

154 F.3d at 1095 (second emphasis added; citations omitted). As the *Evak* court further expounded:

> Whatever interests the states might have had in the OCS and marginal sea prior to statehood were lost upon ascension to the Union. The Constitution allotted to the federal government jurisdiction over foreign commerce, foreign affairs, and national defense so that *as attributes of these external sovereign powers*, it has paramount rights in the contested areas of the sea. *This principle applies with equal force to all entities claiming rights to the ocean: whether they be the Native Villages, the State of Oregon. or the Township of Parsippanv. "National interests, national responsibilities, national concerns are involved" in all these cases.*

Id. at 1096 (emphasis added; citations omitted).

Because the Covenant, in Section 101, grants the United States full sovereignty over the NMI at the termination of the Trusteeship, and does not expressly reserve to the CNMI ownership of the submerged lands and marine resources underlying the oceanic

waters off its coastlines, the United States, based on long-standing precedent, possesses the paramount rights in the marine resources and oceanic submerged lands abutting the Commonwealth, contrary to the CNMI's claim of ownership and assertions of sovereignty. On this basis alone, the United States is entitled to summary judgment rejecting the CNMI's quiet title complaint seeking a "judgment declaring that title to the submerged lands underlying the . . . archipelagic waters, and territorial waters adjacent to the [NMI] is vested in the [CNMI]" (fn. omitted). For the same reason, the United States is entitled to the relief requested in its counterclaim, namely, a declaratory judgment decreeing 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."

B. The CNMI's Allegations to the Contrary Are Without Merit

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4. The CNMI's Allegation That The NMI's People's Right to Local Self-Government Includes Ownership of Submerged Lands Is Without Substance

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The United States' exercise of paramount rights over the oceanic submerged lands abutting the Commonwealth does not infringe upon the CNMI's right of local self-government under Covenant § 103. Section 103 provides:

> The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to *internal* affairs *in accordance with a Constitution of their own adoption.*

(emphasis added.) As the above language shows, nothing in Section 103 of the Covenant addresses the question of ownership of

oceanic submerged lands, or intimates that the Commonwealth's authority to "govern themselves with respect to internal affairs pursuant to their own Constitution" extends to the ownership of such lands. To the contrary, insofar as Section 103 of the Covenant expressly subordinates the CNMI's cal self-government authority to the CNMI Constitution, Covenant § 103 points to U.S. law as the basis upon which the CNMI's claims to submerged lands must be determined.

As previously explained, the CNMI Constitution, explicitly acknowledges that whatever claim the NMI may have to ownership of oceanic submerged lands and resources would be governed by United States law, not Section 801 of the Covenant. *See* CNMI Const. Art. XI, § I and Art. XIV, § I (and corresponding sections CNMI Constitutional Analysis). Under U.S. law, ownership of submerged lands seaward of the coastline is neither an incident of local self-government nor within the police powers of any U.S. state or territory. Rather, as the Supreme Court succinctly put it: "[if the property, whatever it maybe, lies seaward of the low-watermark, its use, disposition, management, and control involve national interests and national responsibilities." *United States v. Texas*, 339 U.S. at 719. Indeed, as the Court declared more emphatically in *United States v. Louisiana*:

> Protection and control of the area are indeed functions of national external sovereignty. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

339 U.S. at 704. Given that control of oceanic submerged lands, as a matter of U.S. law, is a "function of national external sovereignty," and given that the United States has acquired complete "national external sovereignty" over the Commonwealth pursuant to Section 101 of the Covenant, the CNMI's claim to ownership of submerged lands as a "right of self-government and

the right to govern themselves with respect to internal affairs" must be rejected.[27]

5. The CNMI's Contention That It Owns The Oceanic Submerged Lands Abutting The Coast of The Commonwealth Because It Did Not Enter Into A Political Union With The United States On An "Equal Footing" With U.S. States Lacks Merit

In paragraph 32 of the complaint, the CNMI alleges that it owns the oceanic submerged lands abutting the Commonwealth because:

> [u]nder the Covenant, the Commonwealth is not incorporated into the United States, that is, it is not intended to eventually become a State of the United States. The Commonwealth is not on an equal footing with the States of the United States.

As we now explain, the "equal footing" doctrine has no legal bearing upon the United States' paramount rights to the submerged lands abutting the Commonwealth's shorelines.

* * * *

The United States is not predicating any part of its claim to paramount rights over submerged lands off the coast of the CNMI

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[27] Despite the United States' position that Section 801 requires the transfer of only fast lands to the Conmonwealth, the United States makes no claim to the bed and banks underlying the CNMI's internal waters, or to the CNMI's tidelands (i.e., the intermittently submerged lands between the high and low water marks on the CNMI's coasts. This is consistent with the May 1973 statement of U.S. negotiating position by James M. Wilson, Deputy Representative for the U.S. Office of Micronesian Status Negotiations wherein Mr. Wilson stated: "[s]o far as submerged lands are concerned, we feel that these should vest in the future Marianas government under the new arrangement, *as in the case of the states of the United States and other territories.*" Thus, even though the equal footing doctrine is inapplicable to the CNMI, it is the United States' position that the CNMI owns and may regulate pursuant to Covenant § 103 the bed and banks underlying internal waters, and the tidelands, i.e., the lands between the high and low water mark on the CNMI's seacoasts, just as U.S. states do under the equal footing doctrine.

on a notion that the CNMI has entered into a political union with the United States pursuant to pursuant to Art. IV, § 3, Cl. 1 of the U.S. Constitution or is otherwise on an equal footing with U.S. states. The CNMI nonetheless has argued in past position papers that the paramount rights doctrine is inapplicable where (as here) a U.S. territory has not entered into a political union on an equal footing with U.S. states. This argument must be rejected because it is based on a distorted interpretation of the Supreme Court's tidelands cases. There is nothing in *United States v. California* [332 U.S. 19 (1947)] or its progeny to suggest that federal paramountcy principles are not applicable when the claimant of oceanic submerged lands is not a U.S. state. To the contrary, after assessing a claim by Native Americans to oceanic submerged lands abutting Alaska in light of the Supreme Court's tidelands cases, the Ninth Circuit ruled:

> the paramountcy doctrine is *not* limited merely to disputes between the national and state governments. Any claim of sovereign right or title over the ocean by any party other than the United States, including Indian tribes, is equally repugnant to the principles established in the paramountcy cases.

Native Village of Evak v. Trawler Diane Marie. Inc., 154 F.3d at 1090. In the same case, the court went on to declare that the federal paramountcy doctrine applies "with equal force to all entities claiming rights to the ocean: whether they be the Native Villages, the State of Oregon, or the Township of Parsippany." *Id.* at 1096 (footnote omitted). Thus, contrary to the allegations in the Complaint, at ¶ 32, the equal footing doctrine has no bearing on any issue in this case.

* * * *

8. Even If Section 801 of the Covenant And/Or Secretarial Order No. 2969 and Were Deemed To Convey Ownership Of Oceanic Submerged Lands To The Commonwealth, The Lands Conveyed Would Not Exceed Three Nautical Miles From The CNMI's Shorelines

. . . [E]ven assuming *arguendo* that a permanent transfer of the TTPI's interest in oceanic submerged lands to the Commonwealth was contemplated by Section 801 of the Covenant and/or Secretarial Order Nos. 2969 or 2989, such a transfer would have conveyed submerged lands underlying, at most, a three-mile belt seaward of the CNMI shorelines, and not the twelve mile territorial sea (as measured from archipelagic baselines) as claimed in the Complaint.

As previously explained, the Section-By-Section Analysis of the Covenant describes Section 801 of the Covenant in these terms:

> Section 801 provides that all of the real property (including buildings and permanent fixtures) to which the Government of the Trust Territory of the Pacific Islands will be transferred to the Government of the Northern Marianas. . . . *The Section applies to all land to which the Trust Territory Government has rights on the date that the Covenant is signed, or which it acquires thereafter in any manner whatsoever*. The Section serves as a guarantee that all of the *public land* in the Northern Marianas will be returned to its rightful owners, the people of the Northern Marianas.

(emphasis added.) . . .

Section 1 of Title 67 of the Trust Territory Code defines "public lands" as "those lands situated within the Trust territory which were owned or maintained by the Japanese government as government or public lands. . . ." TTPI Code section 32 of the Trust Territory Code provides that:

> That portion of the law established during the Japanese Administration of the area which is now the Trust territory of the Pacific Islands is hereby confirmed, that all marine areas below the high water mark belong to the government, is hereby confirmed as part of the law of the Trust Territory. . . .

Accordingly, the Trust Territory Code does not define the seaward extent of submerged lands appertaining to the NMI, except by reference to Japanese Law.

Japan administered the Mariana Islands pursuant to a mandate from the League of Nations between World War I and World War II. During that time, Japan claimed and recognized three nautical miles as the maximum breadth of its territorial sea. That also appears to have been the limit of the territorial sea from the shoreline under international law as of 1947, when the United States assumed the Trusteeship over Micronesia. Thus, assuming that the term "public land" as used in the SBS Analysis, expands the definition of "real property" as used in Section 801 of the Covenant to include oceanic submerged lands, the maximum area of submerged lands that could possibly have been conveyed by Section 801 of the Covenant, when it became effective in January 1978, was three miles seaward of the low watermark on the CNMI's shores.[39] In these circumstances, the CNMI's claim to a

[39] Such an interpretation that Section 801 could convey no more than three nautical miles of oceanic submerged lands (as determined from the low water mark on the CNMI's coasts) would be consistent with Congress' definition of "submerged lands" in the Abandoned Shipwreck Act of 1987, Pub. L. No. 298, 100th Cong. 2d Sess., 102 Stat. 432, wherein Congress defined the term "submerged lands" in the CNMI, *for the purposes of that Act only*, as "the lands of the [CNMI] as described in section 801 of the Pub. L. 94–241 (48 U.S.C. § 1681) [i.e., the Covenant]." In the legislative history of that Act, Congress made clear that it did not consider Section 801 of the Covenant to include submerged lands situated more than" three miles distant from the coastline of the Northern Mariana Islands." 1988 U.S. Code Cong. & Ad. News (Leg. Hist. 366). As for the definition of "submerged lands" in that Act, i.e., as lands described in section 801 of the Covenant, it is unclear why Congress defined "submerged lands" in this manner in light of the Department of the Interior's contemporaneous advice that the CNMI Covenant does not refer to submerged lands, and that the status of submerged lands had not yet been determined by federal law." determined by straight archipelagic baselines. The Law of the Sea did not recognize the right of countries to differentiate their internal waters from the territorial sea on the basis of straight archipelagic baselines until 1982, two years after the Marine Sovereignty Act was enacted and six years after Congress ratified the Covenant. Moreover, the right to draw straight archipelagic baselines is enjoyed only by "Coastal States," i.e., independent sovereign nations. *See id*. The CNMI has never been an independent sovereign nation and thus is ineligible, of its own authority, to differentiate its internal waters from the territorial sea on this basis.

twelve-mile territorial sea, and a 200-mile EEZ, must be rejected because it is at odds with the Trust Territory Code's definition of "public lands."[40]

The CNMI's claim to archipelagic baselines as the demarcation points upon which to differentiate its claim to ownership of submerged lands underlying inland waters from its claim of ownership of submerged lands underlying a 12-mile territorial sea is equally defective. That claim derives from the CNMI's local "Marine Sovereignty Act of 1980," which purports to establish the CNMI's right to draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the purported archipelago. Nothing in the Trust Territory Code provided for the drawing of straight archipelagic baselines to differentiate the Commonwealth's internal waters from the territorial sea, and there is no evidence that, during its League of Nations Mandate over what would become the TTPI, the Japanese Administration differentiated the Trust Territory's inland waters from the territorial sea on that basis.[41] Accordingly, Section 801 of the Covenant could not have transferred submerged lands to the CNMI on the basis of straight archipelagic baselines. Apart from Covenant § 801, there is no other basis upon which

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[40] On December 27, 1988, President Ronald Reagan issued a Proclamation No. 5928, extending the U.S. territorial sea from three-to-twelve nautical miles for international purposes. (4 Fed. Reg. 777 (1988). To prevent the proclamation from expanding state jurisdiction, President Reagan included a proviso stating that "nothing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom." Id. The CNMI's claim of sovereignty over a 12-mile territorial sea is not only contrary to the paramount rights doctrine, it also clashes with Proclamation No. 5928, pursuant to which the President of the United States has asserted a conflicting claim of ownership of a 12-mile territorial sea.

[41] Even if the Japanese Administration had made a claim to archipelagic baselines for the NMI, the claim would have violated international law. The drawing of straight archipelagic baselines did not become an accepted norm of international law until 1982, four years after Section 801 of the Covenant became effective, and 37 years after the Japanese control of the islands had terminated. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, A/Conf 62/122, reprinted in 21 I.L.M. 1261 (1982).

the CNMI could lawfully assert the right to submerged lands underlying inland waters and a territorial sea, as

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Cross References

Executive branch role in treaty interpretation, **Chapter 8.B.4.a.(2)**
Executive branch role in treaty termination, **Chapter 4.B.5.**
Relationship between treaty and federal statute, **Chapter 10.A.6.d., Chapter 15.A.4.**
Role of executive branch in military context, **Chapter 18.A.4.b.(3)(1)**
U.S. sovereign immunity, **Chapter 8.B.4.c.**
Constiutionality of state statute concerning holocaust victims, **Chapter 8.B.3.a.**
Extraterritorial effect of state legislation mandating disclosure of foreign insurance policies, **Chapter 8.B.4.a.**

Chapter 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On March 31, 2002, the Department of State published the 2002 Country Reports on Human Rights Practices, in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as amended, and § 504 of the Trade Act of 1974, as amended. The report is available at *www.state.gov/g/drl/rls/hrrpt/2001/*. These reports are often cited as a source for U.S. views on various aspects of human rights practice in other countries.

2. Inter-American Commission on Human Rights: Authority to Adopt Precautionary Measures

As discussed in Chapter 18A.3.d., on March 12, 2002, the Inter-American Commission on Human Rights adopted precautionary measures requesting the United States "to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal . . . in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights." Letter from Juan Mendez, President of the Inter-American Commission on Human

Rights, to Colin Powell, U.S. Secretary of State (March 12, 2002). The IACHR decision is reprinted at 41 I.L.M. 532 (May 2002). The action was in response to a February 25, 2002, request seeking "the urgent intervention of the Inter-American Commission on Human Rights ("Commission") in order to prevent continued unlawful acts that threaten the rights of [individuals captured in Afghanistan who now are being] detained by the United States government at its military base at [Guantanamo]."

The United States filed its response to the request for precautionary measures on April 4, and an additional response on July 15, 2002. Among other things, in the July 15 filing, excerpted here, the United States argued that the Commission lacked authority to request the United States to implement precautionary measures and that, even if the Commission had such authority, such measures would not be binding. U.S. arguments that the laws of armed conflict and human rights are distinct bodies of law, that the facts underlying the detention of the enemy combatants at Guantanamo are central to understanding the limited jurisdiction of the Commission in this case, and that the Commission does not have the requisite jurisdictional competence to apply international humanitarian law are discussed in Chapter 18.A.3.d.

The full text is available at *www.state.gov/s/l/c8183m*.

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II. THE COMMISSION LACKS JURISDICTION TO ISSUE PRECAUTIONARY MEASURES IN THIS CASE

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A. The Commission Lacks a Mandate to Request the United States to Implement Precautionary Measures

Petitioners fail to demonstrate that the Commission's organic documents provide it with the authority to request a non State-Party to

the American Convention to implement precautionary measures. The Petitioners point primarily to the Commission's Rules of Procedure and its prior practice as evidence of its mandate, (fn. omitted) but neither its practice nor its Rules establish the Commission's mandate. Its practice is indicative of the Commission's own view of the scope of its mandate; its Rules are adopted only by the Commission itself, not States Parties to either of the constituent documents.

In fact, the Commission's mandate is established by the OAS Charter[24] and the American Convention on Human Rights.[25] While the OAS Charter does not refer to precautionary measures, Article 63 of the American Convention refers to the ability [of the Inter-American Court of Human Rights ("Court")] to adopt "provisional measures as it deems pertinent. . . ." The Statute of the Inter-American Commission, adopted pursuant to Article 39 of the American Convention and having been approved by the OAS General Assembly, provides a subsidiary source for determining the Commission's mandate.[26] Article 19 of that Statute builds upon the mandate set forth in Article 63 of the Convention, by authorizing the Commission to request the Inter-American Court of Human Rights for "provisional measures as it considers appropriate in serious and urgent cases. . . ." But none of these organic documents —the OAS Charter, the American Convention or the Commission Statute—allude to any power of the Commission to act on its own accord to request precautionary measures, much less to issue *binding* precautionary measures. Standing alone, without basis in the Commission's organic documents, Article 25 of the Commission's

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[24] Charter of the Organization of American States, *signed in*, Bogota in 1948, *amended by*, the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993, *reprinted in, Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/1.4 rev. 8, at 194–229 ["*Basic Documents*"].

[25] American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1969), *reprinted in, Basic Documents*, at 23–47.

[26] See *Statute of the Inter-American Commission on Human Rights, approved by* O.A.S. Gen. Assembly Res. 447 (October 1979), ["*Commission Statute*"] *reprinted in Basic Documents*, 119–26.

Rules of Procedure provides no mandate for the Commission to request precautionary measures against the United States.[27]

B. Even if the Commission Had Authority to Issue Precautionary Measures, Such Measures Would Not Be Binding

Even if the Commission possesses the authority to issue precautionary measures against the United States, such measures, at most, amount to non-binding recommendations. The non-binding character of such measures is grounded in the Statute of the Commission, the practice of other human rights bodies, and the writings of jurists. It is also consistent with the jurisprudence of the Inter-American Court.

The non-binding nature of Commission recommendations corresponds with the structure of the Commission Statute. Article 20 of the Statute of the Commission grants the Commission authority only:

> To make recommendations to [non-parties to the American Convention], when it finds this appropriate, in order to

[27] Some authorities on the Commission contend that the issuance of precautionary measures "derive from the Commission's competence and functions (see Article 41 of the American Convention)." See David J. Padilla, *Provisional Measures under the American Convention on Human Rights*, in LIBER AMICORUM HECTOR FIX-ZAMUDIO 1189–96, at 1189–90, note 4 (1998). Even if this were the case, it would only be the case for States Parties to the American Convention. Article 41's preamble provides that "[t]he main function of the Commission shall be to promote respect for and defense of human rights." It further provides the Commission with enumerated functions and power, including, in paragraph (f): "to take action on petitions and other communications pursuant to its authority under the provisions of Article 44 through 51 of the Convention." To the extent that Article 41's preamble and its paragraph (f) provide the mandate for the Commission's issuance of precautionary measures, Articles 44 through 51 only apply to States Parties to the American Convention. Thus, the former Assistant Executive Secretary of the Commission also acknowledges that the "Commission's issuance of precautionary measures are only expressly provided for in the Commission's Regulations." (The Commission's Regulations were later changed to be called its Rules). . . .

> bring about more effective observance of fundamental human rights.

The Commission has authority to offer recommendations to all OAS members, and has the enhanced power to request the Court to issue provisional measures against Convention States-Parties. Because Court-ordered measures are generally stronger sanctions than mere recommendations, in order to comply with the meaning of the text on its face, the authority of the Commission to make recommendations under Article 20 must be less powerful than such measures; that is, it must be non-binding. To find otherwise would conflict with the facial intent to preserve for the Court the authority to issue provisional measures against States-Parties to the American Convention.

Petitioners cite in support of the binding nature of the request of the Commission for precautionary measures, the Commission's assertion that "international tribunals routinely issue precautionary measures or their equivalent in urgent matters, including the Inter-American Court, the International Court of Justice, the European Court of Human Rights and the UN Human Rights Committee."[28] But that observation is misleading. The first three of the bodies are Courts created by treaties—in which the Courts are given specific powers by the States Parties. While the character of provisional measures in each of the three courts may be unclear, the Courts' statutes provide for binding final judgments.[29] The States Parties that have accepted the jurisdiction of each of these Courts, did so, aware that final judgments of each of these Courts

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[28] Petitioners' Observations, at 3–4, citing *Juan Raul Garza v. United States*, Case No. 12.243, at para 69, *reprinted in* 2000 ANN. REP. I.A.C.H.R., vol 2, at 1255–1303 (2001).

[29] See Statute of the International Court of Justice, at http://www.icj-cij.org/icjwww/ibasicdocuments/Basetext/istatute.htm. For the Inter-American Court, the English text of the American Convention's Articles 67 and 68 provides that "judgments" are final and binding. But because of differences in translation between the English, Spanish, French, and Portuguese texts, it is unclear as to whether the Court's provisional measures "decisions" are binding. *See* Thomas Buergenthal, *Interim Measures in the Inter-American Court of Human Rights*, in INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS 69–94 (R. Bernhardt ed. 1994). . . .

are binding. That situation is very different from the situation of the Commission vis-à-vis the United States or a State not a party to the American Convention.

As to the UN Human Rights Committee, established pursuant to the International Covenant on Civil and Political Rights, its interim measures are also non-binding.[31] Under Article 5.4 of the Optional Protocol, the Committee does not decide on an individual's communication. Instead, "[t]he Committee shall forward its views to the State Party concerned and to the individual." Rule 86 of the Committee's Rules of Procedure provides similarly that

> The Committee may prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation.

Thus, the Committee may only request that a State take interim measures, and the State is not legally bound to comply.[32] The Committee itself has also said that its "decisions" are not binding:

> It is useful to note that the Committee is neither a court nor a body with a quasi-judicial mandate, like the organs created under another international Human Rights instrument, the European Convention on Human Rights (i.e., the European Commission of Human Rights and the

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[31] [sic] *See* P.R. GHANDHI, THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION—LAW AND PRACTICE, at 57–58 (1998). *See also* David Kretzmer, *Commentary on Complaint Processes by Human Rights Committee and Torture Committee members: The Human Rights Committee*, in THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY 2000, at 164 (Bayefsky ed.) ("The fact that the Optional Protocol does not state that the Human Rights Committee's views under the Protocol are legally binding, and that there are no enforcement mechanisms, was a clear policy decision by the international community.")

[32] *See* Front Line, *The Human Rights Defender's Manual*, at *http://www.frontlinedefenders.org/manual/en/hrc_m.htm* (visited June 12, 2002).

> European Court of Human Rights). Still the Committee applies the provisions of the Covenant and of the Optional Protocol in a judicial spirit and, performs functions similar to those of the European Commission of Human Rights, in as much as the consideration of applications from individuals is concerned. Its decision on the merits (of a communication) are, in principle, *comparable to the reports of the European Commission, non-binding recommendations*. The two systems differ, however, in that the Optional Protocol does not provide explicitly for friendly settlement between the parties, and, more importantly, *in that the Committee has no power to hand down binding decision as the European Court of Human Rights*. States Parties to the Optional Protocol endeavour to observe the Committee's views, but in case of non-compliance the Optional Protocol does not provide for an enforcement mechanism or for sanctions."[33]

Finally, Courts, including the European Court of Human Rights, the Privy Council, and those of Canada, have also treated the Committee's decisions as non-binding or unenforceable.[34] Simply put, there is no support for the proposition that the Human Rights Committee can issue binding precautionary measures.[35]

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[33] *See* Introduction, SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL, Vol. 2 (1990), at p. 1.

[34] *In the Case of Cruz Varas and Others*, Eur. Ct. H.R. Ser. A. No. 46/1990/237/307 (1991); *Briggs v. Baptiste*, J.C.J. No. 47 (1999); *Ahani v. Canada* (Attorney General), Feb. 8, 2002, Court of Appeal for Ontario, at *http://www.ontariocourts.on.ca/decisions/2002/february/ahaniC37565.htm* (visited June 13, 2002).

[35] Although the Committee has recently altered its own views as to the effect of its request for interim measures, finding a State to be in violation of its obligations under the Optional Protocol if it does not abide by the request, Communication No. 869/1999: Phillipines, CCPR/C/70/D/869/1999, Oct. 19, 2000, the Committee premised its views on the Philippines having an obligation to allow the Committee to consider individual communication as a party to a treaty that specifically granted the Committee such competence. This is very different from the situation vis-à-vis the United States and the Commission.

A more relevant body of jurisprudence for purposes of analyzing the Commission's mandate, which is not mentioned by the Petitioners, is the former European Commission on Human Rights. For many years, it fulfilled a role in Europe similar to that played by the American Commission in the Americas—in that the Commission operated in tandem with the Court of the regional system. But the European Court of Human Rights ("European Court") has held under similar circumstances that, absent a specific provision in the European Convention on Human Rights ("European Convention"), the European Commission did not have the power to order legally binding interim measures. . . .

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An examination of the Inter-American Court's jurisprudence also does not support the contention that precautionary measures should be treated as binding vis-à-vis non-States Parties to the Convention. Specifically, in the *Loayza Tamayo* case, the Court stated:

> The Court has previously stated that, in accordance with the stipulation regarding interpretation contained in Article 31(1) of the Vienna Convention on the Law of Treaties, the term "recommendations" used by the American Convention, should be interpreted to conform to its ordinary meaning.[42]
>
> However, in accordance with the principle of good faith, embodied in the aforesaid Article 31(1) of the Vienna Convention, if a State signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the obligation to make every effort to apply [sic] with the recommendations of a protection organ of the Organization of American States. . . .[43]

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[42] *Loayza Tamayo Case*, Judgment of Sept. 17, 1997, Series C No. 33, para 79, citing *Caballero Delgado and Santana Case*, Judgment of Dec. 8, 1995, Series C No. 22, para 67 and *Genie Lacayo Case*, Judgment of Jan. 29, 1997, Series C No. 30, para 93.

[43] *Id.*, at para 80.

In other words, the Court held that recommendations were recommendations, but that States Parties to the American Convention had "an obligation" to make every effort to carry out the recommendations of the Commission—a far cry from holding that the recommendations bind non-States Parties.

Finally, the Petitioner's argue that public statements of the United States from 1992 and 1999 contradict the position of the United States that the Commission does not have the power to request binding precautionary measures. The statements they cite, however, are completely consistent with the position of the United States. The United States does stand ready to consider the Commission's non-binding recommendations. It does support a human rights process for the Americas in which it participates. Nonetheless, the United States has never taken the position that Commission's recommendations are binding vis-à-vis other States in the OAS.

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It is clear that the leaders of the Summit States consider the Commission extremely important. But it is also clear that these leaders consider the Commission's authority to be of a non-binding nature.(footnote ommited) In sum, the Commission's organic documents neither give it the authority to issue precautionary measures, nor provide the Commission with the power to issue binding orders vis-à-vis non-States Parties to the American Convention.[47]

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[47] Even if the Commission had the authority to recommend the issuance of precautionary measures, which it does not, precautionary measures are unnecessary because there is no risk, let alone an immediate risk of irreparable harm to the detainees. See U.S. Response, at 28–36. Petitioners' Observations are replete with unsubstantiated and indeed highly implausible speculation as to what might happen to the detainees in the future without Commission intervention "to oversee and ensure the United States compliance" not only with the precautionary measures already improperly requested, but also with additional vaguely fashioned measures. Such speculation includes that the United States might eventually prosecute or even execute particular detainees without benefit of either counsel or appellate review; that the physical or mental condition of some of the detainees after decade-long warfare and abusive conditions in Afghanistan is somehow attributable to more recent United States conduct; and that any detainees suffering physically or mentally

3. Argentina Declassification Project

On August 20, 2002, the Department of State announced the release of newly declassified documents related to human rights abuses and political violence in Argentina from 1975 to 1984 in response to several requests. The press release is set forth below and is available at *www.state.gov/r/pa/prs/ps/2002/12863pf.htm.*

Today the Department of State is releasing newly declassified documents related to human rights abuses and political violence in Argentina from 1975 to 1984. These documents include the period of the military dictatorship from 1976 to 1983, preceding events and the return to democracy.

We are releasing these documents to assist Argentina in investigating acts of violence during the time period covered. This release responds to a variety of requests, including from the Government of Argentina; the Government of Uruguay; the Grandmothers of the Plaza de Mayo; and the United States Congress. These documents are also responsive to mutual legal assistance treaty (MLAT) requests to the Department of Justice from Argentina, Italy and Spain in connection with criminal investigations of human rights violations.

Today's release will take place simultaneously here and in Buenos Aires. Hard copies of the documents will shortly be presented to the other governments that have requested them.

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today are not receiving proper if not better treatment at Guantanamo than would have been feasible in the field of battle during the ongoing armed conflict in Afghanistan. Nothing in the Petitioners' Observations disputes the commitment of the United States Government to treat the detainees humanely and consistent with the principles of the Geneva Convention. Moreover, none of the precautionary measures suggested by Petitioners find support in applicable international norms or in fact. The fundamental flaw, however, in the Petitioners' logic is that the precautionary measures sought are anticipatory and hardly permissible either under the Commission's Rules, at Art. 25(1), or the Commission Statute, Article 19(c). The United States declines to reply to the merits of Petitioners' idle speculation in view of the Commission's lack of jurisdiction in this case or authority to issue such precautionary measures in any event.

This release consists of approximately 4,700 documents. A complete set of the released documents is available for public review at the Department of State FOIA Reading Room. Copies of the documents will be available on the Internet at *http://foia.state.gov*.

B. DISCRIMINATION

1. Race

a. Resolutions in Resumed 56th Session of UN General Assembly Third Committee

The 56th Session of the UN General Assembly Third Committee suspended proceedings at the end of its 2001 session on November 30, 2001, awaiting final versions of the World Conference Against Racism/Durban documents. The 56th Session resumed in 2002 and considered the following resolutions: Comprehensive implementation of and follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (A/RES/56/266); Measures to combat racism, racial discrimination, xenophobia, and related intolerance (A/RES/56/267); Third Decade to Combat Racism and Racial Discrimination (A/RES/56/265); and Measures to be taken against political platforms and activities based on doctrines of superiority and violent nationalist ideologies which are based on racial discrimination or ethnic exclusiveness and xenophobia, including neo-Nazism (A/RES/56/268).

On January 28, 2002, Ambassador Sichan Siv, United States Representative to the United Nations Economic and Social Council ("ECOSOC"), addressed the Third Committee on the U.S. commitment to combating racism in the United States and abroad.

His remarks to the Third Committee of the UN General Assembly, excerpted below, are available at *www.un.int/usa/02_008.htm*.

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Racism, racial discrimination, xenophobia and related intolerance will not yield to a political process that is one-sided, that excludes opposing views out of hand, or that is immune from critique. Accordingly, the United States remains committed to the elimination of racism everywhere, through a free and open debate. At the same time, we must all recognize that history is immutable: we cannot go back and revise it. The past must be acknowledged, and its lessons must be learned.

Although the United States did not wish to lend its fullest support to the World Conference Against Racism and will not endorse its outcome document, our commitment to the goals of the Conference is unequivocal and should not be doubted. We believe that each country must confront its own past in order to learn from it and to be able to devise effective national remedies. So, at home and abroad, we will continue to use the best tools at our disposal—democracy, education and the rule of law—to ensure that justice prevails over the disadvantages, stigmas and prejudices spawned by racism in all its manifestations and wherever it rears its ugly head.

On February 26, 2002, the Third Committee took up the four resolutions. Although joining consensus on three of the resolutions, the United States voted against Resolution 56/266 on implementation of and follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Michael Southwick, Deputy Assistant Secretary for International Organizational Affairs, U.S. Department of State, provided an explanation of the U.S. vote, as set forth below.

The United States is committed to the fight against racism, racial discrimination, xenophobia and related intolerance, both within the United States and around the world.

Our national experience shows that this battle is a long one, one that requires a strong, unequivocal commitment. Our commitment is reflected in the comprehensive national report we made last year in Geneva to the Committee on the Elimination of Racial Discrimination.

One part of our fight as a world community is the fight against anti-Semitism. This ugly phenomenon led to the most devastating genocide in modern times, yet we still see its existence throughout the world. A civilized society cannot tolerate this, or any ideology that attempts to denigrate one group of people and that leads to hatred, exclusion and violence.

As is well known, the United States withdrew from the World Conference Against Racism in Durban and, accordingly, was not part of the agreement to adopt the Durban Declaration and Programme of Action. In our view, the Conference placed inappropriate and unacceptable focus on a single country-specific situation that was, and remains, totally irrelevant to the subject matter of the Conference. In so doing, the Conference deviated from its original, stated purpose of crafting positive, forward-looking solutions to contemporary racism, racial discrimination, xenophobia and related intolerance. We are also mindful that the conference was accompanied in the streets of Durban by some of the worst examples of hate and intolerance witnessed in many decades.

The United States has additional concerns about this resolution, namely those paragraphs that will require an expenditure of funds from the regular budget of the United Nations. These provisions call for funds to be put toward the operation of an anti-discrimination unit in the Office of the High Commissioner for Human Rights and the establishment of a body of five eminent persons to monitor the implementation of the Durban documents. Because we did not agree to the establishment of either body, we must object to the Third Committee's approval of these mechanisms in this resolution.

For the foregoing reasons, the United States must vote against the adoption of this resolution.

Nevertheless, make no mistake, the United States remains committed to the goals the Conference was initially established to fulfill, that is, to combat racism, racial discriminations, xenophobia and related intolerance. Our position is simply that, in this struggle, we must keep our focus clear, and never again allow a conference on racism to typify in some respects the very opposite of its original aims and objectives.

b. Resolutions in 57th Session of UN General Assembly

In the 57th Session of the UN General Assembly Third Committee, the United States called for a vote and voted no on Resolution 57/195, The fight against 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/57/195. The resolution was adopted on December 18, 2002.

The United States joined consensus on Resolution 57/194, International Convention on the Elimination of all Forms of Racial Discrimination, also adopted on December 18, 2002. A/RES/57/194. Before doing so, the United States called for a vote and voted no on operative paragraph 10 of section I of the resolution, which "[i]nvites the Committee [on the Elimination of Racial Discrimination] to consider the relevant provisions of the Durban Declaration and Programme of Action in the discharge of its mandate."

The U.S. Government's explanation of its position on Resolution 57/194 is set forth below in full.

Thank you, Mr. Chairman. The resolution before us invites the Committee on the Elimination of Racial Discrimination to consider the provisions of the Durban Declaration and Programme of Action in discharge of its mandate. This would involve an inappropriate and substantial expansion of the Committee's mandate beyond receiving States Parties' reports and commenting on the implementation of the Convention.

— Because of the flaws in the process leading up to Durban and in the outcome documents from Durban, we oppose any expansion of the Committee's mandate that would have it consider the provisions of Durban.
— Further, this resolution concerns the implementation of CERD, not Durban. Accordingly, this provision is out of place in the present resolution.

— For these reasons, the United States has called for a vote on OP 10 of Section 1 of this resolution and voted no.
— We would like to emphasize that the United States strongly condemns racial discrimination and has worked in UN fora towards its eradication. We are a Party to the CERD convention. While we would like all Member States to ratify it as well, we cannot support language in this or any other resolution that does more than ask sovereign states to consider becoming a party to the treaty. Section 3, OP 3 of the resolution [reaffirming "its conviction that ratification of or accession to the Convention on a universal basis and the implementation of its provisions are necessary for the realization of the objectives of the Third Decade to Combat Racism and Racial Discrimination and for the implementation of the commitments undertaken under the Durban Declaration and Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance"] does not take this approach.
— In addition, Section 3, OP 5 of the resolution, urges states to assure that their reservations on the Convention are not incompatible with international treaty law. The United States holds the view that, pursuant to the Vienna Convention on the Law of Treaties, Article 18, the only criterion for judging whether a reservation to a treaty is acceptable is that the reservation must be compatible with the object and purpose of the treaty.
— Therefore, we oppose inclusion of the phrases "or otherwise contrary to international treaty law" and "or that are otherwise incompatible with international treaty law."
— For these reasons, the United States joins consensus on the resolution, but cannot co-sponsor it.

2. Gender

a. Women, peace, and security

On October 28, 2002, Josiah Rosenblatt, Minister-Counselor for Political Affairs at the U.S. Mission to the United Nations,

addressed a meeting in the UN Security Council on women, peace, and security.

The full text of his remarks is available at *www.un.int/usa/02_172.htm*.

Mr. President, we welcome the opportunity to participate in this discussion on women, peace and security. It has been nearly two years to the day since the passage of the landmark Security Council Resolution 1325 and we are pleased that the Council has maintained a focus on tracking its implementation.

We welcome the completion of the Secretary-General's report on women, peace, and security, which provides a thoughtful analysis of the challenges confronting women and girls during armed conflict and offers a number of useful recommendations on ways the international community can help address them.

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I know that we are in agreement that reports and discussions about the situation of women and girls in armed conflict are just a beginning. But reports provide the supporting data that the Secretary-General, the Council, the Secretariat, and member states contributing to peace operations can use to integrate gender perspectives into all peace-building, peacekeeping and peacemaking efforts. Reports can help us to determine the best way to achieve our goals in three specific areas:

to improve the lives of women and girls who are victims of armed conflict,
to ensure that women and girls who have been combatants are eligible for the same assistance as men, and finally,
to involve women increasingly as actors, at the grass-roots level, in Peacekeeping Missions, and in planning and decision-making levels at UN headquarters.

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b. Convention on the Elimination of All Forms of Discrimination Against Women

(1) U.S. domestic procedures

On July 8, Secretary of State Colin L. Powell wrote to the Senate Foreign Relations Committee ("SFRC") indicating that the executive branch wished to undertake a thorough review of issues in implementation of the Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13, to determine what reservations, understandings and declarations would be necessary in the ratification process. The Convention was adopted by the United Nations General Assembly on December 18, 1979, and entered into force on September 3, 1981. The United States signed the Convention on July 17, 1980. President Carter submitted the Convention to the Senate on November 12, 1980, for its advice and consent to ratification. S. Treaty Doc. No. 96-53 (1980). In 1994, it was reported favorably by the SFRC but was never brought up for a full Senate vote.

The Secretary's letter, excerpted below, letters from National Security Adviser Condoleeza Rice, Assistant Attorney General for Legislative Affairs Daniel J. Bryant, and Senator Jesse Helms, as well as dissenting views of seven committee members, are included in S. Exec. Rep. No. 107–9 (2002).

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Addressing the issues confronting women—from suffrage to gender-based violence—is a priority of this Administration. We are committed to ensuring that promotion of the rights of women is fully integrated into American foreign policy. Our recent actions in Afghanistan underscore this commitment to promote the rights of girls and women who suffered under the draconian Taliban rule, including in education, employment, healthcare, and other areas. It is for these and other reasons that the Administration

supports CEDAW's general goal of eradicating invidious discrimination against women across the globe.

The vagueness of the text of CEDAW and the record of the official U.N. body that reviews and comments on the implementation of the Convention, on the other hand, raise a number of issues that must be addressed before the United States Senate provides its advice and consent. We believe consideration of these issues is particularly necessary to determine what reservations, understandings and declarations may be required as part of the ratification process.

As you are aware, the Committee on the Elimination of Discrimination Against Women prepares reports and recommendations to State Parties. Portions of some of these reports and recommendations have addressed serious problems in useful and positive ways, such as women and girls who are victims of terrorism (Algeria)[1] and trafficking in women and girls (Burma).[2] However, other reports and recommendations have raised troubling questions in their substance and analysis, such as the Committee's reports on Belarus (addressing Mother's Day),[3] China (legalized prostitution),[4] and Croatia (abortion).[5]

State Parties have always retained the discretion on whether to implement any recommendations made by the Committee. The existence of this body of reports, however, has led us to review both the treaty and the Committee's comments to understand the basis, practical effect, and any possible implications of the reports. We are also examining those aspects of the treaty that address areas of law that have traditionally been left to the individual States. The complexity of this treaty raises additional important

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[1] Concluding Observations on the Committee on the Elimination of Discrimination Against Women: Algeria, 27/01/99, paragraphs 77–78.

[2] Concluding Observations on the Committee on the Elimination of Discrimination Against Women: Myanmar, 28/01/2000, paragraphs 119–120.

[3] Concluding Observations on the Committee on the Elimination of Discrimination Against Women: Belarus, 31/0–1/2000, paragraph 361.

[4] Concluding Observations on the Committee on the Elimination of Discrimination Against Women: China, 03/02/99, paragraphs 288–289.

[5] Concluding Observations on the Committee on the Elimination of Discrimination Against Women: Croatia, 14/05/98, paragraphs 109, 117.

issues, and we are examining those as well. In mid-April, when the Administration learned that the Committee had set a hearing date for consideration of CEDAW, the Departments of State and Justice began a review of this Convention to assess the need for reservations, understandings, and declarations different from or in addition to those reported out by the Committee in Exec. Rept. 103–38 in October, 1994. Given the passage of time since the last Senate hearing and the breadth of the issues touched upon by the Convention, we believe that a careful review is appropriate and necessary. This review is proceeding as expeditiously as possible.

Although the Administration supports CEDAW's general goals, it believes that eighteen other treaties are either in urgent need of Senate approval or of a very high priority. In addition to the seventeen treaties listed in higher categories on the treaty priority list that are still pending, the Moscow Treaty on the reduction of strategic arms, which was transmitted to the Senate in June, is among our most pressing national security needs and foreign policy interests. At the same time as the Administration is carrying out its review of CEDAW, we hope we can work with the Committee on these high priority treaties. Once our review of CEDAW is complete, we look forward to presenting our views to your Committee.

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On July 30, 2002, the SFRC reported the Convention to the full Senate with the recommendation that the Senate provide advice and consent to ratification. In its report, S. Exec. Rep. No. 107–9 (2002), the SFRC recommended that advice and consent be conditioned on certain reservations, understandings, and declarations.

At the end of 2002 the Senate had not acted on the SFRC report.

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(2) UN resolutions

At the 46th Session of the UN Commission on the Status of Women, held in March 2002, the United States sponsored a

resolution on women in Afghanistan that urged Afghanistan, among other things, "to give high priority to the issue of ratification of CEDAW. . . ." E/CN.6/2002/L.4/Rev.2. Subsequently, on October 17, 2002, the United States disassociated from consensus on Resolution 57/178, Convention on the Elimination of all Forms of Discrimination Against Women, introduced in the Third Committee of the UN General Assembly, A/RES/57/178. That resolution, in operative paragraph 2, urged "all States that have not yet ratified or acceded to the Convention to do so." The United States explained its position as follows:

> The United States is committed to ensuring that promotion of the human rights and fundamental freedoms of women is fully integrated into American foreign policy. Our actions in Afghanistan underscore this commitment to promote the rights of girls and women who suffered under the draconian Taliban rule, including in education, employment, healthcare and other areas. It is for these and other reasons that the United States supports CEDAW's general goal of eradicating invidious discrimination against women across the globe. We note that the question of ratification of CEDAW is being examined by the United States. However, the text of CEDAW and the record of the CEDAW committee raise a number of concerns that the United States is currently reviewing. Moreover, we are concerned about language in the resolution that calls on states to "ratify" CEDAW, rather than to "consider ratifying" CEDAW. Accordingly, the United States disassociates itself from consensus on this resolution.

3. Religion

On October 7, 2002, the International Religious Freedom Report for 2002 was submitted to Congress by the Department of State in compliance with section 102(b) of the International Religious Freedom Act of 1998, Pub. L. No. 105–292, 112 Stat. 2787. The Annual Report on International

Religious Freedom supplements the most recent Human Rights Reports by providing additional detailed information with respect to matters involving international religious freedom. The 2002 report included 192 chapters on the status of religious freedom in individual countries. The report for 2002 is available at *www.state.gov/g/drl/rls/irf/2002.* Remarks by John V. Hanford III, Ambassador-at-Large for Religious Freedom, in a press briefing concerning the release of the 2002 report, are excerpted below.

The full text of Ambassador Hanford's press briefing is available at *www.state.gov/g/drl/rls/spbr/14201.htm.*

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Religious freedom is at the very heart of our identity as Americans and many of our forebears came here to find a haven from religious persecution. But religious freedom is also a universally acknowledged right enshrined in numerous international covenants and declarations. When we advance religious freedom, we are simply urging other nations to join with us in upholding a high but universal standard. In promoting religious freedom, we also further other fundamental liberties, such as the freedom of assembly, freedom of expression, and the freedom to raise one's children the faith of one's choice. Where these freedoms flourish, both government and citizenry learn to value and nurture human dignity.

Finally, advancing religious freedom promotes democracy. As the founders of our nation understood, religious liberty is a cornerstone of democracy; and where there is democracy, there is peace.

The Annual Report on International Religious Freedom was mandated by the 1998 International Religious Freedom Act. The report promotes religious freedom by establishing a factual baseline on this issue in more than 190 countries, thus exposing and giving hope to victims of abuses.

* * * *

I'm glad to say that this year's report reflects good news in many countries where governments protect religious freedom and their citizens value it as a social and political good. Such countries

tend to be democracies in which all fundamental human rights are respected. Unfortunately, that still leaves millions of religious believers in other countries who suffer restrictions and outright persecution at the hands of their governments.

There are a number of reasons for this grim reality. Let me touch briefly on six general categories of religious freedom abuses:

First, totalitarian and authoritarian regimes often perceive religious expression as a threat to their control. North Korea, Burma, China, Vietnam fall into this category.

Secondly, governments that build their legitimacy on a dominant religion often suppress minority religions. Here we find Saudi Arabia, Sudan, Iran.

Third, where there is a strong association between a national identity and a dominant religion, governments may engage in or tolerate repression of other religions. In India, this dynamic led to the deaths of upwards of a thousand Muslims who were killed in reprisal for the earlier massacre of some 60 Hindu pilgrims. In Pakistan, blasphemy laws have led to persecution of Christians and Ahmadis. And just days ago, the parliament of Belarus passed what is now one of the most repressive religion laws in Eurasia.

Fourth, some governments target members of certain religious groups because they are perceived to represent opposition to governmental authority or a threat to stability. Such are Uzbekistan and Turkmenistan. In Iraq, the Shi'a are often brutally persecuted because some do not support Saddam Hussein.

Fifth, a newer form of religious discrimination has arisen across Europe where a concern over violent cults has led to laws and government commissions affecting a wide spectrum of believers. Such actions are particularly troubling because they become models for nations lacking Europe's rule of law.

Finally, religious-based terrorism by nongovernmental actors, often with the support from rogue regimes, is emerging as a new cause of religious persecution. Terrorist organizations such as al-Qaida, which define themselves and their goals in religious terms, are growing in number. They destroy not only adherents of other religions, but also co-religionists who reject their methods or goals.

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4. Persons with Disabilities

On July 30, 2002, Avraham Rabby, United States Advisor for Economic and Social Affairs, addressed the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. In December 2002 the United States joined consensus on UN General Assembly Resolution 57/299 renewing the mandate of the Ad Hoc Committee to continue to consider proposals for a convention concerning persons with disabilities. A/RES/57/229.

The full text of Mr. Rabby's prepared statement, excerpted below, is available at *www.un.int/usa/02_111.htm*.

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The United States welcomes this process of considering proposals to promote and protect the rights and dignity of persons with disabilities. We hope that this process will bring about an increased awareness of disability issues, not only in the UN system, but also in capitals around the world, as countries consider various proposals for strengthening the legal framework for the protection of persons with disabilities.

We are pleased with the participation of NGOs in the meetings of this Working Group. The NGOs have a particular and unique expertise to offer all of our governments. We would note, however, that it is normally the practice in the UN General Assembly to allow all Member States to speak in the General Debate prior to the commencement of NGO speeches. . . .

The most comprehensive effort to give shape to the protection of persons with disabilities in the United States and to the promotion of their equal rights came with the passage of the Americans with Disabilities Act in 1990. When it was passed, the Americans with Disabilities Act, also known as the ADA, was groundbreaking, as it still is today, in the requirements it set out for opening every day American life to full participation by persons with disabilities and protecting the rights of the nation's almost 49 million people with disabilities. As President Bush has stated, all Americans "must

have the opportunity to live independently, work productively and participate fully in community life." We believe that a similar principle should guide all countries and their citizens, and that the ADA can serve as a valuable model for countries as they develop their own legal frameworks to protect the rights and dignity of persons with disabilities.

The ADA has a number of core tenets, including, for example:

Requiring removal or avoidance of architectural and other structural barriers in newly constructed or altered public buildings and spaces as well as commercial facilities.

Requiring reasonable accommodations—that is, where an individual is otherwise qualified for a given position of employment but may be unable to fulfill some non-essential tasks, employers are expected to make reasonable accommodations to ensure that such an otherwise qualified individual will not be considered unqualified simply because of an inability to perform marginal or incidental job functions.

The ADA has spurred the transportation industry in the United States to work toward uniform accessible transportation. Specifically, persons with disabilities can now rely on the availability of accessible fixed-route buses, light rail, trains and airplanes. Although there are still gaps, the strides which have been made since 1990 would have been unthinkable prior to the ADA. It is estimated, this year, that 100 percent of buses in the fixed-route system will be accessible to persons with disabilities.

New standards have also resulted in communications advances for persons with disabilities. The Telecommunications Act of 1996 (Section 255, PL 104–104), requires manufacturers and service providers to ensure that telecommunication products and services are accessible to people with disabilities, if readily achievable. The overarching goal of the requirements is "functional equivalence," and for many speech and hearing impaired persons throughout the country, this is the first time they have been able to take advantage of the freedom, independence, autonomy and opportunity that others have enjoyed through the telephone for over 100 years.

The ADA proves that, when crafted correctly, legislation can have real and lasting effects on the promotion of the rights of

persons with disabilities and have a positive effect on the population as a whole.

Nonetheless, a new treaty, hurriedly conceived and formulated, will not necessarily change the practice of states. Indeed, experience has shown that the human rights instruments that have resulted in the most profound change in state practice have been those instruments which were carefully considered over a substantial period of time and which were adopted by consensus among states, after significant discussions and debate. New thinking comes about when states are pushed to give substantial and in-depth consideration to a topic. Only with new thinking will we see a change in state practice. We hope that our deliberations in this Working Group will inspire new thinking in all of our capitals.

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C. CHILDREN

1. U.S. Participation in Treaties Protecting Children

On November 1, 2002, Andre M. Surena, Assistant Legal Adviser for Human Rights and Refugees, U.S. Department of State, addressed the International Law Students Association Conference on the Protection of Children's Rights Under International Law at St. Louis University, St. Louis, Missouri. His prepared remarks, set forth below, provide an overview of U.S. participation in a range of treaties that protect children and U.S. concerns that have prevented ratification of the Convention on the Rights of the Child.

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I note that the published title of this panel is "The United States and its Participation in the Convention on the Rights of the Child." I am pleased that the task I have been assigned is broader than that.

There are, in fact, a number of treaties beyond the Convention on the Rights of the Child that deal with the protection of

children. Please note that I have used the word "protection" [of children], rather than [children's] "rights." More about that later.

Briefly, I would like to mention several of these other treaties.

The Hague Convention on the Civil Aspects of International Child Abduction, concluded in 1980, provides a system for the rational resolution of international parental child abduction cases. International parental child abduction is an increasing and especially difficult phenomenon. The primary purpose of this treaty is not to reward the abducting parent, and to require the return of the child to his place of habitual residence, where the issue of custody should be litigated. The United States has ratified this treaty and US courts have implemented its terms fairly. Regrettably, the same cannot be said in other countries. You may have noticed public and Congressional criticism of unsatisfactory implementation of this treaty by a number of countries, including Germany and Sweden.

Another treaty, the Hague Convention on Inter-Country Adoption, concluded in 1993, provides a system to facilitate international adoption. The United States has not yet ratified it, but that goal is near. The Senate has given advice and consent to ratification, and implementing legislation has been enacted. The Government now needs to adopt implementing regulations, at which time the United States will be in a position to ratify this Convention.

This treaty creates a system to ensure that international adoptions have the true consent of birth parents and are not disguised sales or trafficking in children.

Perhaps foremost among other treaties that protect children is ILO Convention 182 on the Worst Forms of Child Labor. It was adopted unanimously in 1999 by the International Labor Organization. The Convention bans four categories of child labor: (1) modern slavery, debt bondage and similar practices including forced or compulsory recruitment of children for use in armed conflict; (2) sex work, including pornography and prostitution; (3) illicit activities, in particular drug trafficking and (4) any other work which by its nature is likely to harm the health, safety, and morals of children. The Convention defines a child to be any person under the age of 18.

This Convention is limited in scope and represents a compromise text on several points. But, it does constitute a concise, focused and realistic instrument.

The relationship between exploitative labor and the loss of education is a key issue in the Convention. As ultimately adopted, the Convention incorporates the obligation "to ensure access to free basic education, and wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labor."

Another key issue is international cooperation to end the worst forms of child labor. The Convention text that was adopted calls for enhanced international cooperation and assistance and reflects US policy and practice. Notably, the U.S. is currently the world's largest donor to the ILO's International Program on the Elimination of Child Labor (IPEC).

Ending exploitative child labor practices such as those identified in the Convention is one of the most important human rights issues of our time.

Yet, ratification alone of these new human rights labor standards will not ensure that they become a reality in the lives of millions of children toiling in intolerable conditions. Governments and the international community must continue to work together to establish mechanisms to monitor compliance with the Convention, ensure that children have access to schools, and enhance international cooperation. Achieving this goal will continue to demand much of the United States and all those who are committed to advancing this cause. The United States ratified ILO Convention 182 in 2000.

In May 2000, the UN General Assembly adopted two Protocols to the Convention on the Rights of the Child: (1) the Protocol on the Involvement of Children in Armed Conflict; and (2) the Protocol on the Sale of Children, Child Pornography and Child Prostitution. These instruments represent major advances in the international effort to strengthen and enforce norms for the protection of the most vulnerable children, who desperately need the world's attention.

The Children in Armed Conflict Protocol deals realistically with the difficult issues of minimum ages for compulsory recruitment,

voluntary recruitment, and participation in hostilities. The Protocol raises the age for military conscription to 18 years from 15 years that is currently stipulated under international law; it requires States Parties to raise the minimum age for voluntary recruitment to an age above the current 15-year international standard; and it requires States Parties to take all feasible measures to ensure that personnel in their national armed forces who are not yet 18 do not take a direct part in hostilities. States Parties to the Protocol would also prohibit the recruitment and use of persons below the age of 18 by non-governmental armed groups.

The Sale of Children Protocol is the first international instrument to define the terms "sale of children," "child pornography," and "child prostitution" and should help guarantee that the perpetrators of these offenses are brought to justice. The Protocol requires States Parties to treat acts relating to such conduct as criminal offenses, and establishes cooperative law enforcement mechanisms to prosecute offenders. Additionally, the Protocol establishes broad grounds for jurisdiction over offenses and commitments to extradite offenders, with the aim of ensuring that offenders can be prosecuted regardless of where they are found.

Each Protocol also contains provisions that promote international cooperation and international assistance in the areas of rehabilitation and social reintegration of children who have been victimized.

Though styled as Protocols to the Convention on the Rights of the Child, each Protocol, by its terms, will operate as an independent multilateral agreement under international law. Thus, States may ratify either Protocol without becoming a party to the convention.

These Protocols complement ILO Convention 182 on the Worst Forms of Child Labor, which requires, inter alia, that States Parties take immediate and effective action to secure the elimination of the forced or compulsory recruitment of children for use in armed conflict, the sale and trafficking of children, and the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances.

One controversial issue in the negotiation of these Protocols concerned the proposal of the United States that each Protocol be

subject to ratification or accession by any State, even if it was not a party to the Convention the Rights of the Child. Developing countries in general supported the U.S. proposal, stating that it was important to achieve the widest possible adherence to the Protocols to make it clear that they spoke for the entire world community. Several European delegations argued that only States Parties to an instrument should be allowed to become parties to an optional protocol to that instrument.

Ultimately, the U.S. proposal was accepted in the children in armed conflict negotiations, after the UN Office for Legal Affairs issued an opinion supporting the U.S. view. The opinion concluded that "there is no necessary legal impediment to an instrument which is entitled 'optional protocol' being open to participation by States which have not also established, or which do not also establish, their consent to be bound by the convention, to which that instrument is said to be an 'optional protocol.'" The opinion further stated that the U.S. proposal was similar to the ratification provision in the 1967 Protocol Relating to the Status of Refugees which, pursuant to Article V, is open to accession by all States Parties to the Convention on the Status of Refugees, and any other State which is a member of the UN.

The issue was not resolved until the reports of the Working Group were adopted at the Commission on Human Rights. At these meetings States agreed that the Protocols would have similar provisions on ratification—the Children in Armed Conflict Protocol would be subject to ratification by any State, while the Sale of Children Protocol would be subject to ratification by any State party or signatory to the Convention. This met U.S. requirements since the United States had signed the Convention in February 1995.

The Protocols give the United States the unique opportunity to reaffirm that it is at the forefront of issues to protect children. Given concerns expressed by members of the U.S. Senate with respect to the Convention on the Rights of the Child, the United States has worked to negotiate other human rights instruments that protect children, such as ILO Convention 182 on the Worst Forms of Child Labor. The United States was one of the first States to ratify that treaty after its adoption by the ILO in 1999.

To this point, the United States has demonstrated a willingness to provide similar leadership with respect to the Protocols. The President signed and submitted both Protocols to the Senate within 2 months of their adoption by the General Assembly. Before the Protocols had even arrived, both the Senate and the House had adopted concurrent resolutions by unanimous consent urging that the President "consult closely with the Senate with the objective of building support for [the Children in Armed Conflict Protocol]" and that "the Departments of State and Defense should undertake all possible efforts to persuade and encourage other governments to ratify and endorse the new optional protocol on the use of child soldiers."

The President recently signed the instruments of ratification of the two Protocols, which will shortly be deposited with the UN Secretary General.

As I noted earlier, the proposal to allow States that had not ratified the Convention on the Rights of the Child to ratify the Protocols was made by the United States. This was because the United States believed that the subjects of the Protocols merited serious consideration, that the United States wanted to be part of the regimes that were intended to create, and that there was no realistic prospect of US ratification of the Convention. Having said that, let us look at the Convention on the Rights of the Child.

The Convention was adopted by the UN General Assembly in 1989. It covers a broad range of issues, including education, health care, freedom of religion and speech, and protection against various forms of exploitation.

The Convention poses issues that involve: (1) division of powers between federal and state governments and (2) current domestic law and practices relating to the treatment of children.

I will mention a few issues:

One is *Federalism*. To a much greater extent than other human rights treaties that the United States has ratified, this Convention addresses areas now regulated by, and traditionally considered to be the province of, state and local governments and courts (such as measures for child development and protection, custody, visitation and support arrangements, adoption and foster care, education and welfare). Moreover, there is considerable diversity

in the details of how such issues are addressed in the many state and local jurisdictions of the United States. Because once ratified the Convention would apply to state and local as well as federal government action, it could "federalize" these issues, displacing inconsistent state and local law and injecting the federal government for the first time into areas for which it has had relatively little responsibility.

Another set of issues concerns U.S. *Domestic Law and Practice*. In several areas the Convention's requirements are clearly inconsistent with U.S. law and would require either reservations, understandings or declarations, or legislation to conform U.S. law to the requirements of the Convention.

One such area involves the *Juvenile Death Penalty*. Article 37(a) of the Convention provides that "neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age." This provision clearly provides protection beyond that afforded by the United States Supreme Court's decision in *Stanford* v. *Kentucky*, 492 U.S. 361 (1989), in which the Court held that the imposition of capital punishment on an individual for crimes committed at age 16 or 17 does not constitute cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. A substantial number of states authorize capital punishment for crimes committed at age 16 or above and allow 16- and 17-year-olds to be tried as adults for crimes that carry a possible sentence of life imprisonment without the possibility of parole.

Another area relates to *Parental Rights and the Family*. Some critics of the Convention have argued that the Convention accords insufficient attention to the central role of parents and invites government into family matters. This concern is fueled by the perception that many of the rights specifically endorsed by the treaty (e.g., to freedom of expression, thought, conscience, religion, privacy, access to the media, etc.) would not be subject to parental authority. Supporters of the Convention argue that Article 5 of the Convention requires States Parties to respect the responsibilities, rights, and duties of parents and other persons legally responsible for the child to provide "in a manner consistent with the evolving capacities of the child, appropriate direction and guidance

in the exercise by the child of the rights recognized in the present Convention."

The question remains whether the Convention is properly construed as a limitation on governments, or as a means to provide children with new rights legally enforceable against parents and guardians. Or both.

Further, I would note that the Convention deals also with *Economic, Social and Cultural Rights*. The Convention describes and guarantees rights to health care and medical treatment, an adequate standard of living, and rest and leisure, and commits States Parties in Article 4 to undertake to implement such rights through "all appropriate legislative, administrative and other measures . . . to the maximum extent of their available resources." In the United States, these have not traditionally been regarded as legally enforceable "rights" but rather as services, benefits or entit1ements that may be amended or rescinded solely on the basis of political or budgetary considerations.

Moreover, in this respect, the Convention may be interpreted to call for substantial new benefit programs for children, with significant resource implications. For example, Article 24(1) calls upon States Patties to "recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health"; Article 27(1) calls upon States Parties to "recognize for every child the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."

Some additional issues also require careful consideration. For example, it is unclear whether the requirement in Article 17 that States Parties encourage the mass media to disseminate certain information and to have particular regard to the linguistic needs of certain children would authorize or require the Federal Government to take action inconsistent with the First Amendment.

Because Article 2 specifically extends the obligations of States Parties to "each child within their jurisdiction," it could have significant impact on application of the Immigration and Nationality Act, for example by precluding distinctions based on legal and illegal presence, or immigrant and non-immigrant status.

Conclusion

In conclusion, I think it is clear that the United States strongly supports treaties aimed at the protection of children. We have ratified and fairly implemented those treaties that we consider effectively attain this goal.

The "selective participation" [to use Professor Sloss' words] that the United States has chosen is purely rational and practical. Negotiating multilateral treaties is a committee process to the nth degree. You try your best to achieve a sound result. Once the negotiations are over, you must review the result. If, on review, the resulting text continues to pose difficulties, you put it aside and look for better results elsewhere.

2. U.S. Ratification of Protocols to Convention on Rights of the Child

On December 24, 2002, the United States became party to two optional protocols to the Convention on the Rights of the Child: the Optional Protocol on Involvement of Children in Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. *See* S. Treaty Doc. No. 106–37 (2000), S. Exec. Rep. No. 107–4 (2002). *See also* Digest 2000 at 356–364. As discussed in C.1. and in Chapter 4.B.2., the United States could become a party to the Protocols even though it is not a party to the underlying Convention.

The Senate provided advice and consent to ratification on June 18, 2002, subject to certain reservations, understandings, and declarations in its resolution of ratification, as set forth below. These terms were included in instruments of ratification signed by President George W. Bush.

a. Children in armed conflict

(1) Senate advice and consent

The Optional Protocol on Involvement of Children in Armed Conflict was adopted by the UN General Assembly on May 25, 2000, and came into force on February 12, 2002. At the time of U.S. ratification, 110 countries had signed and forty-two (including the United States) had ratified it. A fact sheet issued by the Department of State on December 24, 2002, describing the provisions of the protocol and its importance is available at *www.state.gov/r/pa/prs/ps/2002/16213pf.htm*.

The Senate's advice and consent was made subject to the understandings and conditions set forth below. 148 CONG.REC. S5,717 (June 18, 2002).

The Senate advises and consents to the ratification of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children In Armed Conflict, opened for signature at New York on May 25, 2000 (Treaty Doc. 106–37; in this resolution referred to as the "Protocol"), subject to the understandings in section 2 and the conditions in section 3.

SEC. 2. UNDERSTANDINGS.

The advice and consent of the Senate under section 1 is subject to the following understandings, which shall be included in the United States instrument of ratification of the Protocol:

(1) No assumption of obligations under the Convention on the Rights of the Child.—The United States understands that the United States assumes no obligations under the Convention on the Rights of the Child by becoming a party to the Protocol.

(2) Implementation of obligation not to permit children to take direct part in hostilities.—The United States understands that, with respect to Article 1 of the Protocol—

(A) the term "feasible measures" means those measures that are practical or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations;

(B) the phrase "direct part in hostilities"—

(i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and

(ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment; and

(C) any decision by any military commander, military personnel, or other person responsible for planning, authorizing, or executing military action, including the assignment of military personnel, shall only be judged on the basis of all the relevant circumstances and on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.

(3) Minimum age for voluntary recruitment.—The United States understands that Article 3 of the Protocol obligates States Parties to the Protocol to raise the minimum age for voluntary recruitment into their national armed forces from the current international standard of 15 years of age.

(4) Armed groups.—The United States understands that the term "armed groups" in Article 4 of the Protocol means nongovernmental armed groups such as rebel groups, dissident armed forces, and other insurgent groups.

(5) No basis for jurisdiction by any international tribunal.—The United States understands that nothing in the Protocol establishes a basis for jurisdiction by any international tribunal, including the International Criminal Court.

SEC. 3. CONDITIONS.

The advice and consent of the Senate under section 1 is subject to the following conditions:

(1) Requirement to deposit declaration.—The President shall, upon ratification of the Protocol, deposit a binding declaration under Article 3(2) of the Protocol that states in substance that—

(A) the minimum age at which the United States permits voluntary recruitment into the Armed Forces of the United States is 17 years of age;

(B) the United States has established safeguards to ensure that such recruitment is not forced or coerced, including a requirement in section 505(a) of title 10, United States Code, that no person under 18 years of age may be originally enlisted in the Armed Forces of the United States without the written consent of the person's parent or guardian, if the parent or guardian is entitled to the person's custody and control;

(C) each person recruited into the Armed Forces of the United States receives a comprehensive briefing and must sign an enlistment contract that, taken together, specify the duties involved in military service; and

(D) all persons recruited into the Armed Forces of the United States must provide reliable proof of age before their entry into military service.

(2) Interpretation of the protocol.—The Senate reaffirms condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe (CFE) of November 19, 1990 (adopted at Vienna on May 31, 1996), approved by the Senate on May 14, 1997 (relating to condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988).

(3) Reports.—

(A) Initial report.—Not later than 90 days after the deposit of the United States instrument of ratification, the Secretary of Defense shall submit to the Committee on Foreign Relations and the Committee on Armed Services of the Senate a report describing the measures taken by the military departments to comply with the obligation set forth in Article 1 of the Protocol. The report

shall include the text of any applicable regulations, directives, or memoranda governing the policies of the departments in implementing that obligation.

(B) Subsequent reports.—

(i) Report by the Secretary of State.—The Secretary of State shall submit to the Committee on Foreign Relations and the Committee on Armed Services of the Senate a copy of any report submitted to the Committee on the Rights of the Child pursuant to Article 8 of the Protocol.

(ii) Report by the secretary of defense.—Not later than 30 days after any significant change in the policies of the military departments in implementing the obligation set forth in Article 1 of the Protocol, the Secretary of Defense shall submit a report to the Committee on Foreign Relations and the Committee on Armed Services of the Senate describing the change and the rationale therefor.

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b. Sale of children, child prostitution, and child pornography

Senate advice and consent

The Optional Protocol on Sale of Children, Child Prostitution and Child Pornography was adopted by the UN General Assembly on May 25, 2000, and entered into force January 18, 2002. At the time of U.S. ratification, 105 countries had signed and forty-two (including the United States) had ratified it. A fact sheet issued December 24, 2002, by the Department of State described the provisions of the protocol and its importance, available at *www.state.gov/r/pa/prs/ps/2002/16216.htm*.

The advice and consent of the Senate was made subject to the reservations, understandings and declarations set forth below. 148 CONG.REC. S5,718 (June 18, 2002).

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SEC. 2. RESERVATION.

The advice and consent of the Senate under section 1 is subject to the reservation, which shall be included in the United States instrument of ratification of the Protocol, that, to the extent that the domestic law of the United States does not provide for jurisdiction over an offense described in Article 3(1) of the Protocol if the offense is committed on board a ship or aircraft registered in the United States, the obligation with respect to jurisdiction over that offense shall not apply to the United States until such time as the United States may notify the Secretary-General of the United Nations that United States domestic law is in full conformity with the requirements of Article 4(1) of the Protocol.

SEC. 3. UNDERSTANDINGS.

The advice and consent of the Senate under section 1 is subject to the following understandings, which shall be included in the United States instrument of ratification of the Protocol:

(1) No assumption of obligations under Convention on the Rights of the Child.—The United States understands that the United States assumes no obligations under the Convention on the Rights of the Child by becoming a party to the Protocol.

(2) The term "sale of children".—The United States understands that the term "sale of children", as defined in Article 2(a) of the Protocol, is intended to cover any transaction in which remuneration or other consideration is given and received under circumstances in which a person who does not have a lawful right to custody of the child thereby obtains de facto control over the child.

(3) The term "child pornography".—The United States understands the term "child pornography", as defined in Article 2(c) of the Protocol, to mean the visual representation of a child engaged in real or simulated sexual activities or of the genitalia of a child where the dominant characteristic is depiction for a sexual purpose.

(4) The term "transfer of organs for profit".—The United States understands that—

(A) the term "transfer of organs for profit", as used in Article 3(1)(a)(i) of the Protocol, does not cover any situation in which a child donates an organ pursuant to lawful consent; and

(B) the term "profit", as used in Article 3(1)(a)(i) of the Protocol, does not include the lawful payment of a reasonable amount associated with the transfer of organs, including any payment for the expense of travel, housing, lost wages, or medical costs.

(5) The terms "applicable international legal instruments" and "improperly inducing consent".—

(A) Understanding of "applicable international legal instruments".—The United States understands that the term "applicable international legal instruments" in Articles 3(1)(a)(ii) and 3(5) of the Protocol refers to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption done at The Hague on May 29, 1993 (in this paragraph referred to as "The Hague Convention").

(B) No obligation to take certain action.—The United States is not a party to The Hague Convention, but expects to become a party. Accordingly, until such time as the United States becomes a party to The Hague Convention, it understands that it is not obligated to criminalize conduct proscribed by Article 3(1)(a)(ii) of the Protocol or to take all appropriate legal and administrative measures required by Article 3(5) of the Protocol.

(C) Understanding of "improperly inducing consent".—The United States understands that the term "improperly inducing consent" in Article 3(1)(a)(ii) of the Protocol means knowingly and willfully inducing consent by offering or giving compensation for the relinquishment of parental rights.

(6) Implementation of the protocol in the federal system of the United States.—The United States understands that the Protocol shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the State and local governments. To the extent that State and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of the Protocol.

SEC. 4. DECLARATION.

The advice and consent of the Senate under section 1 is subject to the declaration that—

(1)(A) the provisions of the Protocol (other than Article 5) are non-self-executing; and

(B) the United States will implement Article 5 of the Protocol pursuant to chapter 209 of title 18, United States Code; and

(2) except as described in the reservation in section 2—

(A) current United States law, including the laws of the States of the United States, fulfills the obligations of the Protocol for the United States; and

(B) accordingly, the United States does not intend to enact new legislation to fulfill its obligations under the Protocol.

SEC. 5. CONDITION.

The advice and consent of the Senate under section 1 is subject to the condition that the Senate reaffirms condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe (CFE) of November 19, 1990 (adopted at Vienna on May 31, 1996), approved by the Senate on May 14, 1997 (relating to condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988).

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3. Special Session of the UN General Assembly on Children

On May 15, 2002, Ambassador Sichan Siv, United States Representative on the United Nations Economic and Social Council ("ECOSOC"), addressed the Special Session of the United Nations General Assembly on Children. Excerpts below from his statement, following adoption of the outcome document, provided an explanation of the U.S. position for the official record of the session.

The full text of Ambassador Siv's statement is available at *www.un.int/usa/02_070.htm*.

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The Special Session will mean greater hope for children around the world. The United States reaffirms its commitment to work for their well-being everywhere, recognizing that children are best nurtured in a stable, loving family environment.

We wish to place an explanation of position in the official record of this Special Session.

1. Concerning references in the document to UN conferences and summits and their five year reviews, the United States does not understand any endorsement of these conferences to be interpreted as promoting abortion.
2. The United States understands the terms "basic social services, such as education, nutrition, health care, including sexual and reproductive health," "quality health care services," "reproductive health care," "family planning," or "family planning services," "sexual health needs," "sexual health," and "safe motherhood," in the document to in no way include abortion or abortion-related services or the use of abortifacients. The United States does not include the treatment of injuries or illnesses caused by illegal or legal abortion for example post-abortion care, among abortion-related services.
3. The United States fully supports the principle of voluntary choice in family planning and reiterates that in no case should abortion be promoted as a method of family planning, and that women who have had 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 abstinence, of delaying sexual initiation, monogamy, fidelity, and partner reduction in order to, inter alia, prevent HIV infection.
4. The United States stresses the importance it attaches to universal access to primary and secondary education, particularly for girls, as an essential and integral part of women's sustainable socio-economic development.

5. The United States reaffirms that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State" (Universal Declaration on Human Rights); and that "The right of men and women of marriageable age to marry and to found a family shall be recognized," (International Covenant on Political and Civil Rights, Art. 23, 1–2); and that "Motherhood and childhood are entitled to special care and assistance" (Universal Declaration of Human Rights, Article 25.2). It stresses the need to further address the importance of family stability, the role of fathers, and parent-child communication on responsible sexual behavior, especially abstinence, and delaying sexual initiation. With regard to the phrase "various forms of the family exist," the United States understands this to include single parent and extended families. It reaffirms that governments can support families by promoting policies that help strengthen the institution of marriage and help parents rear their children in positive and healthy environments.
6. The United States understands that "children's rights" are seen at all times in relation to the rights, duties and responsibilities of parents, who have the primary responsibility for their children's education and well-being. 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 and in all aspects of their lives and education for which they have the primary responsibility.

4. Rights of the Child

On October 28, 2002, the United States called for a vote and voted no on UN General Assembly Resolution 57/190, Rights of the Child. A/RES/57/190. The U.S. delegation explained its vote as set forth in the excerpts below.

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

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Mr. Chairman, the United States remains firmly committed to the betterment of children nationally and internationally. As a nation, we place the highest priority on the well- being of all children. However, we believe that neither the negotiating process on this resolution nor the final product, despite its excessive length, contribute significantly toward achieving that objective.

The United States also voted against this resolution because of our profound disagreement on the following points:

- Preambular paragraph 2, paragraph Section I.1, and paragraph Section [V.12] contain formulations concerning the Convention on the Rights of the Child to which we do not agree. We are not a party to the Convention on the Rights of the Child. We do not agree that there is a need for universal ratification of the Convention nor do we accept an obligation to implement its provisions. We do not accept it as the standard for protecting children's rights. In practice, the rights and protections that children enjoy in the United States through a multi-tiered system of national, state, and local laws meet or exceed most of those enumerated in the Convention. Ultimately, decisions on becoming a Party to any multilateral treaty rest with each State as a matter of sovereignty. We have exercised that right in recently ratifying what we consider to be quite valuable treaties concerning children, namely the optional protocols to the Convention on the Rights of the Child, and ILO Convention Number 182 on the worst forms of child labor.
- Second, the resolution insists that all countries recognize the contribution that the establishment of the International Criminal Court has made to the protection of children. The United States acknowledges that the States Parties to the Rome Statue have begun the process of creating the ICC. The United States is not a Party, does not agree with the statement made about the ICC in this resolution, and does not see the need to mention the ICC at this time in a resolution on the rights of children.

For these reasons, the United States has decided to vote against the draft resolution on the Rights of the Child, L.25.

5. The Girl Child

Consistent with its position on Resolution 57/190, *supra*, the United States called for a vote and voted no on operative paragraph 1 of Resolution 57/189, The girl child, A/RES/57/189, which stressed the need for "full and urgent implementation of the rights of the girl child as guaranteed to her under all human rights instruments, including the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, as well as the need for universal ratification of those instruments."

Although the U.S. effort to remove the paragraph failed, the United States joined consensus on the resolution.

D. ECONOMIC, SOCIAL AND CULTURAL ISSUES

1. Development

a. Right to development

The open-ended working group on the right to development met in Geneva from February 25 to March 8, 2002. The working group and an independent expert on the right to development are components of a follow-up mechanism endorsed by the UN Economic and Social Council on July 30, 1998, as recommended by the Commission on Human Rights. *See www.unhchr.ch/development/right-03.html.*

The working group adopted its report on April 11, 2002 E/CN.4/2002/28/Rev.1, available at *www.unhchr.ch/Huridocda/Huridoca.nsf/0/1d1db51f6a4e5ce7c1256b91005268dd/$FILE/G0213317.pdf.* Comments of the United States on the conclusions of the working group, set forth below, were attached to the report as Annex III.

The United States appreciates the efforts of the Working Group on the Right to Development Third Session, especially the efforts of the Chairman.

The conclusions represent a substantial advance over previous years and demonstrate an increased coherence with development dialogues in other fora and in particular with this year's major international conference.

However, we would have preferred a document that more fully reflected the variety of viewpoints expressed during the discussion.

The United States has fundamental differences with the text's conclusions and recommendations and therefore must disassociate itself with the same. We note that there is still no consensus on the precise meaning of the right to development.

Nevertheless, the United States continues to support further discussion in the proper fora that address development and that would genuinely help Member States of the United Nations reach our shared goal of sustainable development.

As President Bush recently stated on the eve of the Financing for Development Conference, good government is an essential condition of development. We would also want to underscore here the three broad standards that the President has outlined as necessary elements for successful development: ruling justly, investing in people, and encouraging economic freedom.

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During the working group meetings, the United States had also commented specifically on a proposal concerning the development of a "suitable permanent follow-up mechanism for the implementation of the right to development" and on a "development compact" proposal included in the report of the independent expert, excerpted below.

The full texts of the two U.S. interventions are available at *www.state.gov/s/l/c8183.htm*.

Follow-up Mechanism

. . . [W]e believe that it is clear from our discussions, especially as it concerns the international component, that further debate is required in order to find points of mutual agreement. We therefore believe that it is premature to discuss the establishment of

a permanent follow-up mechanism. Furthermore, the combined work of the Independent Expert, the activities of the Right to Development Branch and discussions in this Working Group already constitute, at different levels, appropriate mechanisms for the realization of the Right to Development.

. . . It is difficult for us to envision at this time the role that any such mechanism would have. We therefore believe that it is premature to contemplate the establishment of a permanent follow-up mechanism.

Development compacts

My delegation has already taken the floor to share with Mr. Sengupta [the independent expert] and the Working Group some of our views with respect to the recommendations contained in his report. Among them, we briefly mentioned our concerns with his concept of "development compacts," which in our view replicate relationships that already exists between recipient and donor states. In this intervention, we wish to expand on this topic.

We fully agree with Mr. Sengupta that the formulation of development programs requires the full and active participation of all stakeholders, including civil society and the private sector, in an open and transparent process. My government is committed to development and to the well-established idea of international cooperation for development. We believe that development is the key to creating a world that is stable, secure and prosperous. We have extensive bilateral development assistance programs with a number of countries and we have helped create and support a vast system of international institutions that are devoted to the cause of development.

The notion of "development compact" that Mr. Sengupta advocates is a bilateral process that is best left to existing mechanisms, such as agreements between governments and between governments and developing agencies.

Previous speakers have rightly noted that an array of efforts to further strengthen the good governance of international and national mechanisms to achieve tangible development goals

continue to take place in a myriad of fora, many of which enjoy a level of expertise and experience that we could not and should not replicate in this Working Group.

The creation of a financial monitoring institution under the auspices of the Development Assistance Committee of the OECD, and the creation of a fund for development outside of existing International Financial Institutions would duplicate existing mechanisms and would distract human rights attention from the promotion of individual rights and fundamental freedoms without which the right to development can not be realized.

b. Development initiatives

(1) Millennium Challenge Account

On March 14, 2002, President George W. Bush announced the New Compact for Development. The project would create a Millennium Challenge Account to fund initiatives to help developing nations that meet criteria for long-term development. It would also increase core development assistance by 50 percent over the next three years. A fact sheet prepared by the Department of State's Bureau of Oceans and International Environmental and Scientific Affairs, August 23, 2002, describing the features of the new account, is available at *www.state.gov/g/oes/rls/fs/2002/12952.htm*.

(2) G-8 Action Plan for Africa

On June 27, 2002, President George W. Bush, participating in a meeting of the G-8 in Kananaskis, Canada, announced U.S. support for the G-8 Action Plan for Africa. A fact sheet released by the White House, Office of the Press Secretary, on June 27, 2002, describes the action plan and the U.S. views of its consistency with the U.S. Compact for Development. The fact sheet is available at *www.state.gov/e/eb/rls/othr/11515.htm*.

(3) U.S.-Middle East Partnership Initiative

In an address to the Heritage Foundation on December 12, 2002, Secretary of State Colin L. Powell announced a new U.S.-Middle East partnership initiative. A fact sheet issued on the same date provided a summary of the initiative, explaining that it "will provide a framework and funding for the U.S. to work together with governments and people in the Arab world to expand economic, political and educational opportunities for all." The fact sheet is available at *www.state.gov/r/pa/prs/ps/2002/15923pf.htm.* The initiative would encompass over $130 million in assistance, including $29 million in initial funding for pilot projects in support of reform, and more than $1 billion in assistance that the U.S. government provides to Arab countries annually. Excerpts from Secretary Powell's speech below describe the goals of the initiative.

Secretary Powell's speech is available at *www.state.gov/secretary/rm/2002/15920.htm.*

2. Abortion and Involuntary Sterilization

The Foreign Operations, Export Financing and Related Programs Appropriations Act, Fiscal Year 2002, Pub. L. 107–115, provides that "none of the funds made available in this Act . . . may be made available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization." This funding restriction, referred to as the "Kemp-Kasten Amendment," has been included in foreign operations appropriations acts since 1985. Authority to make the relevant determination has been delegated by the President to the Secretary of State. On July 18, 2002, Secretary of State Colin L. Powell determined that "in light of the Kemp-Kasten amendment, no funds made available by the Act may be provided to the United Nations Population Fund ('UNFPA') at this time." Excerpts below

from a letter from the Secretary of State to the congressional leadership and Chairmen of the Senate and House Appropriations Committees provide the basis for his determination. The letter also indicated that the administration intended to consult with Congress concerning use of the funds appropriated for UNFPA to fund USAID's Child Survival and Health Program Fund "to be used for family planning and reproductive health care activities."

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. . . In coming to [the conclusion that no funds may be made available to UNFPA] I relied on information available to me, including briefings supplied by UNFPA, Chinese law, the State Department's annual human rights reports, and the report of a three-member independent assessment team that traveled to the PRC in May 2002 at my request to assess the situation and assist in my determination of whether the Kemp-Kasten Amendment precluded further funding of UNFPA.

. . . Regrettably, the PRC has in place a regime of severe penalties on women who have unapproved births. This regime plainly operates to coerce pregnant women to have abortions in order to avoid the penalties and therefore amounts to a "program of coercive abortion." Regardless of the modest size of UNFPA's budget in china or any benefits its programs provide, UNFPA's support of, and involvement in, China's population-planning activities allows the Chinese government to implement more effectively its program of coercive abortion. Therefore, it is not permissible to continue funding UNFPA at this time. If Chinese laws and practices were changed so that UNFPA's activities did not support a program of coercive abortion, or if UNFPA were to change the program implementation for its funding so that it did not support a program of coercive abortions, I would be prepared to consider funding UNFPA in the future.

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3. Right to Food

a. World Food Summit: five years later

In the declaration adopted at the conclusion of the World Food Summit: five years later ("WFS:fyl"), June 10–13, 2002, in Rome, heads of state and government reaffirmed "the right of everyone to have access to safe and nutritious food." The United States entered a reservation to operative paragraph 10 of the declaration, which invited the FAO Council to establish "an Intergovernmental Working Group . . . to elaborate, in a period of two years, a set of voluntary guidelines to support Member States' efforts to achieve the progressive realisation of the right to adequate food in the context of national food security. . . ."

The U.S. reservation, set forth below, is available at *www.fao.org/DOCREP/MEETING/005/Y7106E/y7106e03.htm#P192_62571.*

The United States believes that the issue of adequate food can only be viewed in the context of the right to a standard of living adequate for health and well-being, as set forth in the Universal Declaration of Human Rights, which includes the opportunity to secure food, clothing, housing, medical care and necessary social services. Further, the United States believes that the attainment of the right to an adequate standard of living is a goal or aspiration to be realized progressively that does not give rise to any international obligation or any domestic legal entitlement, and does not diminish the responsibilities of national governments towards their citizens. Additionally, the United States understands the right of access to food to mean the opportunity to secure food, and not guaranteed entitlement. Concerning Operative Paragraph 10, we are committed to concrete action to meet the objectives of the World Food Summit, and are concerned that sterile debate over "Voluntary Guidelines" would distract attention from the real work of reducing poverty and hunger.

b. UN General Assembly Resolution 57/226

On November 20, 2002, the United States proposed amendments to operative paragraphs 5 and 8 ("OP5" and "OP8") of Resolution 57/226, The right to food. A/RES/57/226. Language at the beginning of OP5, which encouraged all states "to take steps with a view to achieving progressively the full realization of the right to food" would have been replaced with "to take steps with a view to achieving the progressive realization of the right to adequate food." OP 8, which urged states "to give adequate priority in their development strategies and expenditures to the realization of the right to food," would have been amended to refer to "priority in their development strategies and expenditures of the progressive realization of the right to adequate food." The amendments failed. The resolution was adopted with a vote of 160 to 2, with 4 abstentions. The United States voted no.

On November 11, 2002, Ambassador Sichan Siv, U.S. Representative to the Economic and Social Council ("ECOSOC") had addressed the Fifty-seventh Session of the UN General Assembly, in the Third Committee. His remarks provided the views of the United States on the report of Mr. Jean Ziegler, Special Rapporteur on the Right to Food, which contradicted conclusions of experts on the safety of genetically modified foods. Ambassador Siv's remarks are available at *www.un.int/usa/02_189.htm*.

4. Intangible Cultural Heritage

On September 24, 2002, the United States expressed its support for a draft convention for the safeguarding of intangible cultural heritage. Excerpts below from the statement of the U.S. delegation, explain the views of the United States and provide examples of its own undertakings in this area.

The full text of the statement is available at *www.state.gov/sl/c8183.htm.*

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The issue before us, the safeguarding of intangible cultural heritage, is very important to the United States. We have a strong concern for preserving and encouraging the living cultural heritage of our nation, populated as it is by people coming from virtually every nation on earth and practicing an incredibly rich and diverse range of cultures and traditions. We find support for varied cultural traditions important for us as a democracy. . . .

Mr. Chairman, regarding the scope of our task, the US supports the views of the Canadian delegation that any approach to intangible cultural heritage needs to be flexible and multifaceted. We also endorse the view expressed by the Australian delegation. Any statement should have clear and common objectives, explicit and achievable standards and a strategically focused scope and action plan, expressed in simple and unambiguous language.

The United States has a history of safeguarding and supporting intangible cultural heritage. . . . It has worked closely with UNESCO on this very issue.

The preservation and protection of the world's intangible cultural heritage deserves our full and immediate attention. Whether a convention is the appropriate instrument with which to take action is an issue which, the United States believes, deserves further discussion. We believe a plan of action that provides clear strategies and goals and that offers tangible incentives for adoption and implementation might best serve our purposes. Individual states could take on the task of developing appropriate action plans to address intangible cultural heritage while UNESCO could serve the very important role of providing the mechanism for sharing, evaluating, and supporting model action plans.

As a country which finds strength and value in our own great diversity and recognizes the value of intangible cultural heritage around the world, we seek an instrument which all of us are able to support and we look forward to playing a constructive role in pursuit of this goal.

E. TORTURE

On July 24, 2002, the United States abstained from voting on adoption of a Draft Optional Protocol on Torture in ECOSOC. Mr. John Davison, Deputy U.S. Representative to ECOSOC, provided an explanation of the U.S. abstention, as set forth in his prepared remarks below, available at *www.un.int/usa/02_107.htm*.

The United States unequivocally condemns the abhorrent practice of torture. We are a Party to the Convention against Torture and are the largest contributor to the UN Voluntary Fund for the Victims of Torture. Our Federal and state laws prohibit conduct constituting torture and impose heavy penalties on violators.

Consequently, the United States greatly regrets being placed in the position of abstaining on the draft decision that would have the Economic and Social Council adopt the Draft Optional Protocol to the UN Convention against Torture, as well as recommending that the General Assembly do likewise.

However, the current text of the Draft Optional Protocol before ECOSOC has serious flaws. In some respects, its overall approach and certain specific provisions are contrary to our Constitution, particularly with respect to matters of search and seizure. Furthermore, in view of our Federal system of government, the regime established by the draft would be overly intrusive.

Moreover, the draft is before ECOSOC as the result of a premature vote by the Commission on Human Rights that represents a significant departure from the longstanding preference for consensus in formulating new human rights instruments. In addition, the credibility of this draft instrument is greatly undermined by the fact that, despite originally being intended as a universal instrument, it was adopted in a Commission vote with nearly as many negative votes and abstentions as votes in favor (29-10-14).

Finally, there are financial implications potentially involving millions of dollars annually if the current text of the draft optional protocol is adopted. We and others have repeatedly requested that a cost analysis of the draft be carried out by the secretariat,

followed by a detailed report to Member States concerning the impact on the UN budget of implementation of this draft instrument if it enters into force.

On November 5, 2002, the United States offered an amendment to Resolution 57/199, Draft Optional Protocol to the Convention Against Torture ("DOPCAT") before the UN General Assembly's Third Committee. A/RES/57/199. The amendment would have replaced article 25 paragraph 1, which provides that "[t]he expenditure incurred by the Subcommittee on Prevention in the implementation of the present protocol shall be borne by the United Nations." The U.S. amendment read:

> 1. All expenses for the implementation of the present Protocol shall be borne exclusively by the States Parties. The States Parties alone shall also be responsible for reimbursement to the United Nations for any expenses incurred by the United Nations pursuant to paragraph 2 of this article, including use of its staff and facilities.

The amendment was defeated. On November 7, 2002, the United States called for a vote and voted no on the resolution adopting the optional protocol. The resolution was adopted on December 18, 2002.

A fact sheet released by the Department of State on November 4, 2002, reiterated the U.S. commitment to fight torture and provided its views on DOPCAT, as set forth in full below and available at *www.state.gov/p/io/rls/fs/2002/14901.htm*.

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The U.S. Commitment: The United States condemns unequivocally the despicable practice of torture. We have fought to eliminate it around the world. Political will is critical. The United States has led international efforts to put pressure on governments to publicly condemn torture; enact legislation; investigate and prosecute

abusive officials; train law enforcement officers and medical personnel, and provide compensation and rehabilitation for victims.
International Organizations: At the international level, the U.S. has strongly supported the work of the UN special rapporteur against torture, who regularly visits nations to ensure compliance with international norms. The U.S. is a Party to the UN Convention Against Torture, which 130 other nations have ratified. The Convention establishes the Committee Against Torture, which considers complaints and conducts visits to countries where torture is alleged. In addition, the International Committee of the Red Cross (ICRC) and other humanitarian organizations conduct visits to prisons and other places of detention in an effort to prevent or remedy torture. The U.S. is the world's largest donor to the UN Voluntary Fund for Victims of Torture; we contributed $5 million in FY 2002.
Draft Optional Protocol to the Convention Against Torture (DOPCAT): The DOPCAT would establish a new international oversight body, independent from the Committee Against Torture, which would be required to inspect detention facilities in all nations that are States Parties to the protocol. Such visits to these countries would be scheduled in advance on a rotating basis, rather than conducted on an ad hoc basis. Because of the optional nature of this treaty, many of the worst human rights offenders would not be subject to its provisions. The U.S. opposes funding this program through the UN regular budget, which would require the United States to pay 22% of the total implementation costs. Only parties to the protocol should pay implementation costs. The proposed DOPCAT regime represents a potential diversion of resources from the work of other more results-oriented bodies, including the UN Committee Against Torture. Because the United States abhors torture, we seek the strongest means to end this terrible practice. The DOPCAT does not accomplish that.

F. DETENTIONS

Consideration by the Inter-American Human Rights Commission of issues concerning detention of enemy combatants at Guantanamo is discussed in A.2. and in Chapter 18.A.3.d.

G. JUDICIAL PROCEDURE, PENALTIES AND RELATED ISSUES

1. Capital Punishment

In September 2002 at the Annual Human Dimension Implementation Meeting of the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe ("OSCE"), the United States exercised its right of reply to criticisms by other OSCE members of U.S. use of capital punishment. The prepared points for the U.S. statement on this issue are provided below.

- Mr. Chairman, the issue of whether a State imposes the death penalty is a political issue each country has to decide for itself. In the United States, under our Constitution, individual states make that decision. It is an issue with respect to which reasonable people disagree. There is an on going, and I might even say passionate and extensive debate on this issue in the legal and greater community in the United States. As you may be aware, 12 of our states do not impose capital punishment.
- Also, our political system has a built-in opportunity for those who are elected by the majority of the voters, those who make the laws at the state and federal levels, to constantly assess—and reassess—their decision on this issue.
- However, in those states that do carry the death penalty, it is applied only after most rigorous adherence to strictly construed rules of substance and procedure—rules that are constantly assessed and reassessed by courts—and only after open and fair trials and conviction by juries upon findings of guilt beyond reasonable doubt in narrowly circumscribed circumstances—essentially aggravated, intentional homicide.
- We assure you that the U.S. and its states take seriously due process guarantees and provide exhaustive appeals before this ultimate punishment is carried out.

- The great importance and vigorous public debate in the United States on this issue was most recently evidenced by the two very high profile Supreme Court decisions regarding the death penalty.
- One was the case of Atkins vs. Virginia, which was just decided this past June, and decided that execution of mentally retarded criminals constitutes "cruel and unusual" punishment in the words of our Constitution.
- Prior to this decision, 18 states of the 38 that have adopted the death penalty had already banned executions of the mentally retarded.
- In addition, there was a second decision also in June, in which the Supreme Court ruled in a vote of 7-2, in the case of Ring v. Arizona, that a jury, not a judge, must determine whether a capital defendant is eligible to receive the death penalty. The court held that a judge's finding of aggravating factors sufficient to support capital punishment violates the constitutional right to a jury determination on this issue.
- With all that said, let us not forget that the citizenry supports the death penalty. Polls in the U.S. continue to indicate that a majority of Americans support the death penalty, as does a significant percentage of Europeans. A Gallup poll conducted in the United States in May of this year, indicated that 72 percent of those who were polled support the death penalty for a person convicted of murder, slightly up from 68 percent six months prior, but still down slightly from the high support of 80 percent in 1994.
- According to a Wall Street Journal article on July 25 of this year, recent polls conducted by the Central European Research Group in Brussels indicated 75 percent of Poles, 60 percent of Hungarians and 56 percent of Czech Republic citizens would favor a return of the death penalty.
- As noted, however, the debate and divergent points of view continue.
- In closing, I would also like to note that there is no OSCE commitment prohibiting use of the death penalty, and that international law clearly permits the imposition of that penalty. Indeed, the International Covenant on Civil and Political Rights

specifically recognizes the right of states that have not abolished the death penalty to impose it.*

- The United States will continue to keep the Permanent Council apprised of developments regarding the death penalty in our country.

2. References to International Criminal Court in Human Rights Resolutions

As discussed in Chapter 3.C.2.a.(1). *supra*, on May 6, 2002 the United States notified the United Nations that it did not intend to become a party to the Statute of Rome establishing the International Criminal Court and that there were therefore no legal obligations arising from its signature of December 31, 2000. The U.S. position on the ICC was explained in a speech on the same day by Under Secretary of State for Political Affairs Marc Grossman. *See* Chapter 3.C.2.a.(2).

During 2002 the United States addressed language referring to the ICC in human rights resolutions in both the United Nations and the Organization of American States, as discussed below.

a. UN General Assembly Resolutions

(1) Extrajudicial, summary, or arbitrary executions

In November 2002, in the Third Committee of the UN General Assembly, the United States joined consensus on Resolution 57/214, "Extrajudicial, summary or arbitrary executions." A/RES/57/214. Before doing so, however, the United States called for a vote and voted no on preambular

* [Editors' Note: Article 6 of the ICCPR states that capital punishment shall not be imposed for crimes committed by individuals under the age of 18. The United States entered a reservation to this article at the time of ratification. The U.S. Supreme Court has ruled that use of capital punishment under 16 at the time of the offense is unconstitutional. *Thompson v. Oklahoma*, 487 U.S. 85 (1988).]

paragraph 7 and operative paragraph 3 in the draft resolution, which acknowledged the entry into force of the Rome Statute "thereby contributing to ensuring prosecution and the prevention of impunity concerning extrajudicial, summary or arbitrary executions," and "the historic significance of the establishment of the International Criminal Court on 1 July 2002, and the fact that a significant number of States have already signed, ratified or acceded to the Rome Statute, and calls upon all other States to consider becoming parties to the Statute." The vote failed to remove the paragraphs. Set forth below in full is the U.S. explanation for its vote.

The United States is committed to the struggle to end impunity, and, in particular, to end the abhorrent practices of extrajudicial, summary or arbitrary executions. Nevertheless, we must call for a vote on preambular paragraph 7 and operative paragraph 3 based on what we believe are inappropriate references to the International Criminal Court.

The reasons for U.S. opposition to the Rome Statute as adopted are well known, and we will not restate those positions here. Likewise, we reiterate that the United States does not seek to undermine the International Criminal Court. We respect the right of States to become parties to the Rome Statute if they wish. At the same time, our decision not to be a party also should be respected.

We had requested that each of these paragraphs be re-drafted to state facts, as opposed to characterizations of the facts, as the language now reads. The United States believes these references are not properly included in a thematic resolution of this nature.

It is unfortunate that our views regarding these references were not taken into account by the co-sponsors of this resolution, and on this basis, we have called for a vote on each of these paragraphs.

In addition, my delegation wishes to emphasize to the special rapporteur on this subject and to those assisting her from the Office of the High Commissioner the importance of scrupulously observing the terms of her mandate and staying strictly within that mandate. In particular, that mandate does not include abolition of the death penalty or the authority to question a system of

capital punishment that is implemented with due process of law and appropriate safeguards.

(2) Enforced or involuntary disappearances

In November 2002 the United States also joined consensus on Resolution 57/215, Question of enforced or involuntary disappearances. A/RES/57/215. The United States had called for a vote and voted no on preambular paragraph 7 in the draft resolution, which acknowledges "the fact that acts of enforced disappearance, as defined in the Rome Statute . . . , come within the jurisdiction of the Court as crimes against humanity." In addition to repeating the language concerning U.S. views of the International Criminal Court, *supra*, the United States explained the reasons for its vote on this paragraph as set forth below.

We had requested that this paragraph 7 "note the fact that acts of enforced disappearances **could** come within the jurisdiction of the Court." Instead, the paragraph implies that **all** acts of enforced disappearances come within the Court's jurisdiction, not "**some**."

It is unfortunate that our views regarding this paragraph were not incorporated into this resolution. On this basis, we have called for a vote on the inclusion of this paragraph. Nonethless, we will join consensus on the resolution as a whole, to reflect our commitment to addressing the egregious practice of enforced disappearances which the resolution addresses.

(3) Other

The United States also joined consensus on Resolution 57/233, Situation of human rights in the Democratic Republic of the Congo, A/RES/57/233, after calling for a vote and voting no on language that welcomed ratification of the Rome Statute by the Democratic Republic of the Congo.

See also language addressing the International Criminal Court in Resolution 190, Rights of the child, C.4.

b. Resolutions in Organization of American States General Assembly

On June 4, 2002, the General Assembly of the Organization of American States ("OAS") adopted a resolution entitled "Promotion of the International Criminal Court." AG/RES. 1900 (XXXII-0/02). At the request of the United States, a footnote was added to the resolution, providing that "[t]he United States delegation reserves on this resolution and requests that the text of its intervention be included in the final report on the resolution in the proceedings of the General Assembly." The text of the intervention, made on May 22, 2002, is provided below. For the same reasons, the United States also reserved on operative paragraph 3 of a resolution entitled "Promotion of and Respect for International Humanitarian Law," urging "member states that have not yet done so to consider signing or ratifying, as appropriate, the Statute of the International Criminal Court." AG/RES. 1904 (XXXII-0.02).

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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. This is because we have strong objections to the International Criminal Court, which we believe is fundamentally flawed. The International Criminal Court undermines national sovereignty with its claim to jurisdiction over the nationals of states not party to the agreement. It has the potential to undermine the role of the United Nations Security Council in maintaining international peace and security. We also object to the Court because it is not subject to adequate checks and balances. We believe that an independent court with unchecked power is open to abuse and exploitation. Its structure lends itself to the great danger of politically-motivated prosecutions and decisions. The inclusion of the still-undefined crime of aggression within the statute of the Court creates the potential for conflict with the United Nations Charter, which provides that the Security Council determines when an act of aggression has occurred.

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 American engagement in the world to defend freedom and defeat terror; we cannot permit the ICC to disrupt that vital mission.

We reiterate our strong opposition to the establishment of the International Criminal Court. In light of this position, the United States cannot in good faith join in the consensus on an OAS resolution that promotes the Court. Accordingly, the United States hereby enters this reservation on the entire resolution and respectfully requests that its intervention be entered into the final report on this resolution in the Proceedings of the General Assembly and that a footnote be placed on the title of this resolution to both effects.

3. 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 the 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). There is dispute as to whether the statute is merely jurisdictional or provides, or permits a court to infer, a private right of action. *Compare Tel-Oren v. Libyan Arab Republic*, 726 F.2d

774 (D.C. Cir.) (concurring opinion of Judge Bork), *cert. denied*, 470 U.S. 1003 (1984) *with 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 also 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

During 2002 U.S. courts rendered a number of significant decisions under the ATS and TVPA. Individually and collectively, they address a wide range of issues relevant to the scope and interpretation of these statutes.

(1) Tachiona v. Mugabe

In 2001 in a case brought by citizens of Zimbabwe against the President and other senior officials of Zimbabwe as well as the country's ruling political party, the Zimbabwe African National Union-Patriotic Front (ZANU-PF), arising from the campaign of brutality and violence aimed at intimidating and suppressing the political opposition in the months prior to the Zimbabwean national elections in 2000, the District Court for the Southern District Court of New York held that

President Mugabe and his foreign minister were entitled to personal immunity but were not immune from service of process in their roles as agents of ZANU-PF, and that service upon them in that capacity did not transgress their personal inviolability but was sufficient to establish jurisdiction over the political party itself. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001) ("*Tachiona I*"). *See Digest 2001* at 319–335.

In subsequent proceedings, the court denied a motion for reconsideration by the United States with respect to the validity of service, *Tachiona v. Mugabe*, 186 F. Supp. 2d 383 (S.D.N.Y. 2002) ("*Tachiona II*"). It thereafter endorsed the report and recommendation of a magistrate judge that a default judgment should be entered against ZANU-PF in the amount of $73 million (including $20,250,453 in compensatory damages and $53,000,000 in punitive damages) for torture and extra-judicial killing under the TVPA. Noting that the ATS does not indicate which substantive law should be applied in determining liability and damages under that statute, the court reserved decision as to the magistrate's recommendations with respect to plaintiffs' claims under the ATS in order to permit them to submit additional argument regarding the applicable law of Zimbabwe underlying those claims. *Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002) ("*Tachiona III*").

After considering the plaintiffs' supplemental submission, the court adopted the magistrate's report and entered judgment in the recommended amounts for the ATS claims. Its lengthy opinion discussed not only the choice of law issue under the ATS but also the proper scope of its jurisdiction under the statute. *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002) ("*Tachiona IV*"). Excerpts from that decision follow (footnotes and citations omitted).

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* * * *

Under traditional choice of law inputs relevant to the matter at hand, the United States has a significant interest in providing

a forum for the adjudication of claims under the ATCA alleging certain violations of international human rights law, thereby advancing the realization of the values embodied in universally recognized norms. However, given the jurisdictional facts present here, Zimbabwe would have the predominant interests in the adjudication of this case pursuant to Zimbabwe law. All of the Plaintiffs are citizens of Zimbabwe. ZANU-PF is the country's ruling political party, headed by Mugabe. All of the events Plaintiffs describe as constituting the actionable conduct and corresponding injuries occurred in Zimbabwe, arising out of political conflicts and social conditions prevailing there. Thus, the pertinent relationships between this action and the parties and underlying events are predominantly connected with Zimbabwe. Zimbabwe therefore has a strong interest in the application of its local law to the resolution of a controversy so fundamentally rooted in that country.

But what decisional rules should apply if, as discussed below, the governing law of Zimbabwe, while in general terms recognizing some of the rights Plaintiffs invoke here under the ATCA, does not define specific causes of action to vindicate the particular claims asserted, or does not permit recovery of the kinds of damages Plaintiffs seek, or may otherwise bar liability, so that the effect of applying the entire municipal law of Zimbabwe to address the violations of international law here alleged would be to defeat some or all of Plaintiffs' claims and thus the remedy the ATCA contemplated?

Similar concerns have been articulated by other courts that have encountered and addressed these complexities in determining the source of substantive law to apply in adjudicating ATCA claims. The doctrinal underpinnings of the dilemma is best captured in the divergent approaches expressed by the concurring opinions of the Circuit Court in *Tel-Oren v. Libyan Arab Republic* [726 F.2d 774 (D.C. Cir. 1984)] as to whether the ATCA, beyond conferring federal court jurisdiction, creates a cause of action, and as to the sources of any substantive decisional rules governing suits invoking the statute.

As a threshold matter, as Judge Bork observed, international law ordinarily does not create causes of action conferring upon individuals a self-executing right to sue to vindicate particular

violations of universally recognized norms. Rather, many international human rights instruments merely enunciate in expansive generalities particular principles, aspirations and ideals of universal and enduring significance. These sources serve as fonts of broadly accepted behavioral norms that nations can draw upon in carrying out their obligations to their peoples. International law ordinarily leaves it to each sovereign state to devise whatever specific remedies may be necessary to give effect to universally recognized standards. As noted by a leading commentator: "International human rights instruments do not legislate human rights; they 'recognize' them and build upon that recognition [ ]," which assumes the human rights' "preexistence in some other moral or legal order."

To these ends, various international declarations, covenants and resolutions catalogue rights all persons should enjoy; affirm the obligations of nations to ensure those rights by means of implementing legislation; exhort governments to protect and promote widely recognized rights; and pronounce the global community's condemnations and renunciations of wrongful practices. In the words of Judge Bork: "Some define rights at so high a level of generality or in terms so dependent for their meaning on particular social, economic and political circumstances that they cannot be construed and applied by courts acting in a traditional adjudicatory manner."

These norms and practices acquire the status of customary "law of nations" only insofar as they ripen over time into settled rules widely recognized and enforced by international agreements, by judicial decisions, by the consistent usage and practice of states and by the "general assent of civilized nations."

But, because such customary principles and practices of sovereign states do not derive and acquire the status of law from the authoritative pronouncements of any particular deliberative body, they generally do not create specific "causes of action" or a self-executing right to sue entitling victims to institute litigation to vindicate violations of international norms. As one court expressed this point: "While it is demonstrably possible for nations to reach some consensus on a binding set of principles, it is both unnecessary and implausible to suppose that, with their multiplicity of legal systems, these diverse nations should also be expected or

required to reach consensus on the types of actions that should be made available in their respective courts to implement those principles."

Nonetheless, under *Filartiga I* [*Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)], certain wrongful conduct violates the law of nations, and gives rise to a right to sue cognizable by exercise of federal jurisdiction under the ATCA, when it offends norms that have become well-established and universally recognized.

The *Filartiga I* court, however, did not explicitly address whether the federal right of action it inferred existed under the ATCA in fact derives from and is to be substantively adjudicated by principles drawn from international law or from federal or municipal law. Manifesting some ambiguity on this point, the court construed the ATCA "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." Rather, as stated above, the Second Circuit directed that once federal jurisdiction is properly exercised by means of the threshold determination that the claimant has asserted a recognized violation of international law, the rules of decision applicable to adjudication of the case must be decided by a choice of law inquiry employing the considerations set forth in [*Lauritzen v. Larson*, 345 U.S. 571 (1953)].

In his *Tel-Oren* concurrence, Judge Edwards endorsed the view of the Second Circuit that ATCA itself creates a right to sue for alleged violations of the law of nations. He voiced a reservation, however, that the *Filartiga I* formulation "is not flawless" and recognized that the task the ruling entrusts to the district court at the threshold jurisdictional finding is daunting. On this point, he noted that the *Filartiga I* approach "places an awesome duty on federal district courts to derive from an amorphous entity—*i.e.*, the 'law of nations'—standards of liability applicable in concrete situations."

The difficulty inherent in the *Filartiga I* charge is compounded by the second phase of the inquiry the ruling mandates, that of deciding the substantive standards to apply in evaluating ATCA claims involving human rights abuses. The challenge has engendered significant conceptual division and divergent practices among the courts that have addressed the question. In *Tel-Oren*,

for example, Judge Edwards suggested, as an alternative formulation to the *Filartiga I* approach, that litigation may be brought under ATCA asserting substantive rights of action defined as common law torts, with the rules of decision supplied by domestic law of the United States, as long as a violation of international law is also alleged. The alternative also has been the subject of considerable differences among the courts and has generated numerous permutations and adaptations variously applying, as the basis of substantive law in ATCA adjudications, rules of decision drawn from: federal common law; the forum state; the foreign jurisdiction most affected; international law; or a combination of these sources. . . .

* * * *

Just as the sources from which universal norms of international conduct derive are often articulated as generalities or conclusory precepts, equally so many principles of the organic law of sovereign states are typically expressed in terms that are no less sweeping nor any more self-executing. Pronouncements recognizing fundamental rights governing the state's conduct in relation to its people are not always accompanied by corresponding promulgations of specific definitions and causes of action authorizing enforcement through private suits. In consequence, in their assessments of ATCA claims, courts looking to foreign municipal law are likely to encounter common situations, as experienced in the cases discussed above and by this Court in reviewing principles of Zimbabwe law in the matter at hand, that raise significant choice of law impediments to the application of the ATCA and hinder the furthering of the goals of international standards.

The municipal law, for example, may manifest general domestic recognition of a fundamental norm without specifically elevating it further into a defined private right of action. Local rules may also provide a remedy that may not suffice to adequately highlight and respond to the gravity of the conduct and the import of the case. Or else the foreign law may contain no relevant decisional rule at all. Or it may provide a standard that, if applied to adjudicate specific ATCA claims, would dispose of the case in a manner that would defeat a remedy consistent with fostering the purposes

of federal and international law. As succinctly phrased by the *Xuncax* court: "Simply put, municipal law is ill-tailored for cases grounded on violations of the law of nations." [886 F. Supp. at 192.]

* * * *

. . . [W]ell-established, universal, and obligatory norms defining rules of international conduct, evolve by custom and usages of nations over time. They are further elaborated by the works of reputable jurists and scholars and settled through longstanding practice and application in judicial decisions recognizing and enforcing those rules. In consequence, because customary international norms are not always fixed in codifications or treaties, not every nation will necessarily reflect clearly in its domestic jurisprudence principles that manifest its unequivocal assent and adherence to universal standards that may override municipal rules.

By the same token, under customary practice in many global bodies, the declarations, resolutions and covenants that embody international practices are adopted by consensus. This procedure, while giving some legitimacy to the content of the instrument as evidence of broad recognition, at times conceals the degree of unstated reservations or dissent among regimes that do not voice their objections and instead silently join the consensus in response to the pushes and pulls of internal and external social and political pressures. Accordingly, while it may be expedient for a state to refrain from objecting to the international community's promulgation of particular standards to govern relations among nations and their subjects, its tacit acceptance does not always translate into enactment of corresponding municipal law giving meaning and force to the generalities articulated in the instruments with which the state publicly associates itself.

Thus, a gap sometimes exists between the public concurrence the state professes abroad to norms of international conduct in their relations with the community of nations and the measures it actually adopts at home to enable its people to realize the benefits of those universal rules. It is not uncommon in international practice for states to pay lip-service homage to the promulgation

of particular international instruments, and even to ratify binding covenants, but then delay or fail altogether to adopt the municipal implementing legislation necessary to give the enunciated international rights meaningful domestic legitimacy and create an effective national means to vindicate them.

For much of the same reasons, adjudication of claims that assert violations of customary international law and seek to vindicate universally recognized rights often engenders conceptual anomalies between the gravity of the offenses, the high promise conveyed in lofty terms by universally recognized rights, and the limited scope of available municipal remedies. Human rights offenses universally held to contravene the law of nations occupy the low ground reserved by civilized people to rank the most heinous of human behavior. Typically these wrongs are correspondingly branded in language employing the most profound opprobrium, fittingly portraying the depths of depravity the conduct encompasses, the often countless toll of human suffering the misdeeds inflict upon their victims, and the consequential disruption of the domestic and international order they produce. These expressions mark the high stakes enshrined by universally outlawed practices such as genocide; slavery; torture; summary execution; forced disappearance; war crimes and crimes against humanity.

Between the horrid deeds these recognized atrocities proclaim, and the ringing words and promises with which they are universally condemned and renounced in solemn international instruments, lies a reality: that extant municipal law may not be available or may lag behind the need in providing adequate or readily accessible remedies to redress universally recognized wrongs, and that not infrequently, in the absence of any particular right of action specifically defined and promulgated to fit the real wrongs at hand, such means of relief as may exist are achieved only by Procrustean analogies that do not always capture or do justice to the actual grievousness associated with the offenses. . . .

* * * *

In synthesis, the foregoing case law reflects the emergence of a set of decisional rules federal courts have crafted to give scope and content to the cause of action the ATCA creates as it relates to

international human rights law. Under these principles, as regards to misconduct that violates universally recognized norms of international law, the cases suggest several standards to guide ATCA choice of law determinations: (1) the local law of the state where the wrongs and injuries occurred and the parties reside may be relevant and may apply to resolve a particular issue insofar as it is substantively consistent with federal common law principles and international law and provides a remedy compatible with the purposes of the ATCA and pertinent international norms; (2) in the event the local law of the foreign state of the parties' residence and underlying events conflicts with federal or international law, or does not provide an appropriate remedy, or is otherwise inadequate to redress the international law violations in question, a remedy may be fashioned from analogous principles derived from federal law and the forum state, or from international law embodied in federal common law; (3) should the application of law from federal and forum state principles as to some aspect of the claim defeat recovery, an analogous rule drawn from the municipal law of the foreign jurisdiction may be applied to the extent it supplies a basis for a decisional rule that may permit relief; (4) if some part of the claim cannot be sustained as a violation of international law, a remedy might be found by application of the foreign state's municipal law under the federal court's pendent jurisdiction if so invoked.

In essence, what these precedents represent is the natural evolution of common law, and the organic branching of federal substantive rules through the ATCA, which "established a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." This growth of federal decisional law gives expression to the longstanding principle that the law of nations has always been part of federal law.

As a body of federal law develops under this approach, so as to give content to an ATCA right of action and thus fill in the interstices with federal decisional rules, the federal courts' response acquires the virtues of uniformity and recognition of more diverse sources of substantive standards to draw upon in shaping remedies for adjudication of ATCA claims. . . .

* * * *

Having examined the pertinent provisions of the Zimbabwe Constitution and relevant legal doctrine called to the Court's attention in Plaintiff's submission, the Court is persuaded that this authority, though not explicitly creating defined causes of action as to all claims, sufficiently proscribes wrongful conduct and protects substantive rights encompassing Plaintiffs' claims asserting (1) torture and extrajudicial killing, (2) cruel, inhuman or degrading treatment, (3) denial of political rights, and (4) systematic racial discrimination. The Court is not persuaded that a sufficient basis for recovery exists under international law for Plaintiffs' claims asserting uncompensated seizure of their property. However, Plaintiffs have also sufficiently established legitimate grounds for recovery on their expropriation claims under Zimbabwe law.

* * * *

(2) Sarei v. Rio Tinto PLC

Residents of Papua New Guinea ("PNG") brought a class action under the Alien Tort Statute against the international mining consortium Rio Tinto PLC alleging that the group's mining operations had destroyed their island's environment, harmed the health of the residents, and incited a civil war. In July 2002, the U.S. District Court for the Central District of California ruled on various motions by the defendants to dismiss the complaint. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002). In November 2001, at the request of the court for "the Department of State's opinion as to the effect, if any, that adjudication of this suit may have on the foreign policy of the United States," the United States had filed a Statement of Interest setting forth the Department's concerns that continued adjudication of the claims "would risk a potentially serious adverse impact on the peace process [in PNG], and hence on the conduct of our foreign relations." *See Digest 2001* at 337–339.

The court concluded that the claims were non-justiciable "political questions" and ordered their dismissal contingent upon defendants' written consent to have the action proceed in the courts of Papua New Guinea. In a lengthy opinion,

however, it also addressed a number of other jurisdictional matters, holding that the ATS confers jurisdiction and creates an independent cause of action for violations of treaties and the law of nations, including for violations of the law of war, war crimes, and crimes against humanity; racial discrimination; and certain kinds of pollution in violation of the Law of the Sea. It also determined that plaintiffs had failed to establish a cause of action for harm to the environment and the health of residents; that plaintiffs are not required under the ATS to demonstrate that they have exhausted local remedies or that doing so would be futile; and that the act of state doctrine barred some but not all claims. It refused to dismiss the claims on the basis of *forum non conveniens*.

Excerpts from the opinion follow (omitting citations and footnotes).

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In the context of actions arising under the Alien Tort Claims Act, the jurisdictional issue is almost always intertwined with the merits of plaintiffs' claims. As the Second Circuit stated in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), because the statute requires, as a jurisdictional prerequisite, that plaintiffs allege a violation of the law of nations, "[c]ourts have . . . engaged in a more searching preliminary review of the merits than is required, for example, under the more flexible 'arising under' formulation." *Id.* at 887. See also *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447 (2d Cir. 2000) (requiring that a plaintiff proceeding under the Alien Tort Claims Act plead a violation of the law of nations as a jurisdictional prerequisite, and noting that *Filartiga* distinguished the Act, "with its jurisdictional pleading requirement, from general federal question jurisdiction, which is 'not defeated by the possibility that the averments in the complaint may fail to state a cause of action'"); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) ("Because the Alien Tort Act requires that plaintiffs plead a 'violation of the law of nations' at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more

flexible 'arising under' formula of section 1331 [federal question jurisdiction],' " quoting *Filartiga*, *supra*), cert. denied, 518 U.S. 1005, 116 S.Ct. 2524, 135 L.Ed.2d 1048 (1996); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D.N.Y. 1991) ("When considering Alien Tort Statute claims on a 12(b)(1) motion, courts typically engage 'in a more searching preliminary review of the merits than is required, for example[,] under the more flexible arising under formulation,' " quoting *Filartiga, supra*. . . .

* * * *

Thus, for jurisdiction to lie under § 1350, plaintiffs must allege facts sufficient to establish that (1) they are aliens (2) suing for a tort (3) that was committed in violation of the law of nations or a treaty of the United States. See *Kadic, supra*, 70 F.3d at 238 (". . . it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States)"); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164–65 (5th Cir. 1999) ("Section 1350 confers subject matter jurisdiction when the following conditions are met; (1) an alien sues, (2) for a tort, (3) that was committed in violation of the 'law of nations' or a treaty of the United States. . . . Thus, the issue before us is whether Beanal states claims upon which relief can be granted for violations under the 'law of nations,' i.e., international law"); *Alvarez-Machain v. United States,* 107 F.3d 696, 703 (9th Cir. 1996) ("we have previously held that the ATCA has a substantive as well as a jurisdictional component"); *National Coalition Gov't of the Union of Burma v. Unocal, Inc.* ("*Unocal II*"), 176 F.R.D. 329, 344 (C.D. Cal. 1997).

* * * *

To ascertain the content of the law of nations, courts consult the works of jurists on public law, consider the general practice of nations, and refer to court decisions that discuss and enforce international law. See *Beanal, supra*, 197 F.3d at 165; *Kadic, supra*, 70 F.3d at 238; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992).

Looking to such sources, the Ninth Circuit has held that the ATCA "creates a cause of action for violations of specific, universal and obligatory international human rights standards which 'confer [ ] fundamental rights upon all people vis-a-vis their own governments.' " *Hilao II, supra*, 25 F.3d at 1475 (quoting *Filartiga, supra*, 630 F.2d at 885). See also *Filartiga, supra*, 630 F.2d at 888 ("It is only where the nations of the world have demonstrated that the wrong is of mutual and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATCA]"); *Beanal, supra*, 197 F.3d at 167 (same); *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995) (same); *Amlon Metals, supra*, 775 F. Supp. at 671 (same). Cf. *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) ("violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations' ").

In evaluating plaintiffs' ATCA claims, therefore, the court must consider: (1) whether they identify a specific, universal, and obligatory norm of international law; (2) whether that norm is recognized by the United States; and (3) whether they adequately allege its violation. See *Unocal II, supra*, 176 F.R.D. at 345.

* * * *

. . . On its face, the ATCA does not require exhaustion of local remedies; it simply provides that "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. As plaintiffs note, no court has imposed an exhaustion requirement in a case brought exclusively under the ATCA. Rather, all alien tort actions in which exhaustion of remedies has been addressed have involved claims pleaded under the TVPA. . . .

The court is not persuaded that Congress' decision to include an exhaustion of remedies provision in the TVPA indicates that a parallel requirement must be read into the ATCA. . . .

* * * *

. . . As a matter of statutory construction, therefore, the court declines to find that ATCA plaintiffs must exhaust national remedies before filing suit in the United States. . . .

* * * *

Because it is a creature of domestic law, the ATCA need not impose the same conditions on a plaintiff's right to sue as international law or the domestic law of other nations. Accordingly, the court finds that plaintiffs are not required to demonstrate that they have exhausted local remedies, or that doing so would be futile, in order to state a claim under the ATCA.

* * * *

Courts have held that a violation of the law of war may serve as a basis for a claim under the ATCA. See *Kadic, supra*, 70 F.3d at 242–43 ("Plaintiffs also contend that the acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities, violate the law of war. Atrocities of the types alleged here have long been recognized in international law as violations of the law of war. . . . The District Court has jurisdiction pursuant to the Alien Tort Act over appellants' claims of war crimes and other violations of international humanitarian law"); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 444–45 (D.N.J. 1999) (concluding that plaintiff had stated a claim under the ATCA since "deportation of civilian populations to slave labor is a war crime"); *Jane Doe I v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 8 (D.D.C. 1998) (finding jurisdiction under the ATCA for alleged war crimes because the Geneva Conventions, which apply to "armed conflict[s] not of an international character," require that civilians be "treated humanely" and prohibit "murder of all kinds, mutilation, cruel treatment and torture, kidnapping and summary executions"). See also *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV.2025, 2037 (2001) ("[I]f a corporation commits piracy, slave trading, genocide, or war crimes, then it may be held liable under the ATCA even absent state action"); RESTATEMENT, § 404 ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of

universal concern, such as . . . war crimes, . . . even where [no other basis of jurisdiction] is present").

* * * *

Despite defendants' arguments to the contrary, the court concludes that plaintiffs' allegations regarding the decade-long civil war in Bougainville adequately plead the existence of an "armed conflict not of an international character." Because they were engaged in such a conflict, the parties to the struggle—the PNGDF and the BRA—had an obligation to treat civilians humanely. Alleging that defendants intentionally denied civilians medical treatment and supplies through the imposition of a medical blockade adequately pleads "cruel treatment" and an "outrage[ ] upon personal dignity" within the meaning of the treaty. It also adequately pleads a violation of the requirement that "[t]he wounded and sick . . . be collected and cared for."

* * * *

Plaintiffs further contended that a private entity could be held vicariously liable under the ATS if it participated or cooperated in, approved of, or accepted the economic benefits of a state's international law violations. Relying on *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), the court concluded that, if proved, the facts alleged by plaintiffs were sufficient to permit a jury to find that the acts of PNG were "fairly attributable" to Rio Tinto, that it had been a "willful participant" in those acts, and/or that it had exercised "control" over them. The allegations of war crimes and crimes against humanity were thus deemed sufficient to state a claim and confer jurisdiction under the ATCA.

It also sustained, against the motion to dismiss, the claim of racial discrimination, stating that "a claim under the ATCA may be based on the violation of a *jus cogens* norm such as racial discrimination." 221 F. Supp. 2d at 1153. Such a claim must, however, be based on allegations of "state action." In this case, the court determined that the factual allegations that defendants had operated the mine as joint

venture partners with local government authorities was sufficient to demonstrate joint action and therefore state action. *Id*.

With respect to the claims of environmental harms, the court said that plaintiffs had failed to demonstrate that human rights deprivations caused by environmental degradation breached a "specific, universal and obligatory norm of international law" as required under the statute. *Id*. at 1160. It made a similar finding with respect to alleged violations of the principle of sustainable development.

The court reached a contrary conclusion, however, with regard to the allegations of violations of the United Nations Convention on the Law of the Sea ("UNCLOS"). Noting that the complaint alleged that defendant had chemically defoliated, bulldozed, and sluiced off an entire mountainside of pristine rain forest, in effect dumping billions of tons of toxic mine waste into "pristine waters," and polluting a major bay dozens of miles away, and the Pacific Ocean as well, the court concluded that plaintiffs had adequately stated a claim for violation of the customary international law reflected in UNCLOS.

With respect to *forum non conveniens*, the court determined that while defendants had met their burden of demonstrating that PNG would be an adequate forum for adjudication of these claims, it would nonetheless deny the motion to dismiss "because the court finds that the private interests favor retaining jurisdiction, and the public interests are neutral. . . . The court believes such a result is particularly appropriate given that the case is brought under the ATCA and alleges violations of international law. See *Wiwa, supra*, 226 F.3d at 108 (holding that "the policy expressed in the TVPA favoring adjudication of claims in violation of international prohibitions on torture" weighed against dismissing the action on *forum on conveniens* grounds").

With respect to defendants' arguments that the claims were "nonjusticiable," the court first considered the act of state doctrine, taking note of the U.S. Statement of Interest filed November 2001 (*Digest 2001* at 337–339). It determined

that plaintiffs' environmental tort and racial discrimination claims were barred by that doctrine because, if it were to conclude that Rio Tinto had been a "state actor," it would also have to conclude that the official acts of the government were invalid as well. By contrast, the alleged acts of torture, pillage, and illegitimate warfare attributed to the PNG defense forces could not be considered official acts of state.

Finally, the court determined that the political-question doctrine barred all of the plaintiffs' claims.

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* * * *

The political question doctrine employs separation of powers principles to restrict the justiciability of certain issues." See *Custer County Action Association v. Garvey*, 256 F.3d 1024, 1031 (10th Cir.2001). See also *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question' "); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164–66, 2 L.Ed. 60 (1803) ("Questions, in their nature political . . . can never be made in this court"). Most often, the doctrine is invoked in matters involving the foreign relations of the United States. See *Oetjen, supra*, 246 U.S. at 302, 38 S.Ct. 309; *Kadic, supra*, 70 F.3d at 248–49 ("We do not read *Filartiga* to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations. To the contrary, we recognize that suits of this nature can present difficulties that implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches"); *Tel-Oren*, *supra*, 726 F.2d at 803 ("Questions touching on the foreign relations of the United States make up what is likely the largest class of questions to which the political question doctrine has been applied").

Not every case implicating United States foreign relations involves a non-justiciable political question, however. See, e.g., *Kadic*, *supra*, 70 F.3d at 249 ("Although these cases present issues that arise in a politically charged context, that does not transform

them into cases involving nonjusticiable political questions. The doctrine is one of political questions, not one of political cases" (internal citations omitted)); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir.1991) ("The fact that the issues . . . arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question. . . . [B]ecause the common law of tort provides clear and well-settled rules on which the district court can easily rely, this case does not require the court to render a decision in the absence of 'judicially discoverable and manageable standards' ").

To determine whether plaintiffs' claims raise a political question, the court must consider the following factors: "(1) the existence of any textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . (2) a lack of judicially discoverable and manageable standards for resolving the claims; . . . (3) the impossibility of deciding without an initial, nonjudicial, policy determination; . . . (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect for the coordinate branches of government; . . . (5) an unusual need for unquestioning adherence to a political decision already made; [and] (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker, supra*, 369 U.S. at 217, 82 S.Ct. 691. If any one of these factors is "inextricabl[y]" involved in the case, the political question doctrine applies, and the court should dismiss the claims. See *id*.

* * * *

. . . [T]he fact that Congress enacted 28 U.S.C. § 1350, which provides that federal courts "shall" have jurisdiction over claims within its ambit, does not speak to the applicability of the political question doctrine. "Just as 'Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, or to entertain friendly suits,' it may not require courts 'to resolve political questions,' because suits of this character are inconsistent with the judicial function under Art. III." *767 Third Avenue Associates, supra*, 218 F.3d at 164. . . .

* * * *

Consequently, it is appropriate to evaluate whether defendants have met their burden of demonstrating the applicability of the doctrine in this case. As an initial matter, the court notes that the same separation of powers principles that inform the act of state doctrine underlie the political question doctrine. See *Banco Nacional de Cuba, supra*, 406 U.S. at 785–93, 92 S.Ct. 1808 (Brennan, J., dissenting) (noting that the act of state doctrine, as articulated in *Sabbatino*, is equivalent to the political question doctrine); *Trajano v. Marcos*, Nos. 86–2448, 86–15039, 1989 WL 76894, *2 (9th Cir. July 10, 1989) (Unpub.Disp.) ("The act of state doctrine is the foreign relations equivalent of the political question doctrine"). See also *Credit Suisse, supra*, 130 F.3d at 1346; *Tel-Oren, supra*, 726 F.2d at 803. Accordingly, the analysis set forth in the preceding section argues in favor of dismissal on political question grounds as well.

The court has also considered the *Baker v. Carr* factors, and finds that they support invocation of the political question doctrine. Since at least 1998, the executive branch has stated its support for the PNG government, and for PNG's efforts to negotiate a peace agreement resolving the Bougainville conflict. On her trip to the region in 1998, Secretary of State Albright promised "that America [would] do all it [could] to help" the PNG government resolve the civil war in Bougainville. More recently, in the Statement of Interest that it filed with this court, the executive branch reiterated its commitment to peace in Bougainville, and specifically to the peace accord that has been negotiated, *inter alia*, by PNG. It opined that continued adjudication of this lawsuit could negatively impact the peace process, and that the success of that process is an important United States foreign policy objective. Were the court to ignore this statement position, deny the motion to dismiss, and retain jurisdiction over this action, it would surely "express[ ] lack of the respect for the coordinate branches of government," and cause "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker, supra*, 369 U.S. at 217, 82 S.Ct. 691.

Stated otherwise, continued adjudication of this lawsuit implicates the fourth and sixth *Baker* factors, which factors warrant invocation of the political question doctrine. See *In re Nazi Era*

Cases Against German Defendants Litigation, 129 F. Supp. 2d 370, 382 (D.N.J. 2001) ("While the policy interests articulated in the Statement of Interest do not in and of themselves provide an independent legal basis for dismissal, the long-standing foreign policy commitment to resolving claims arising out of World War II and the Holocaust at a governmental level does provide such a basis. If the Court were to allow this action to continue, it would run afoul of the political question doctrine as articulated in *Baker*. Without addressing all six *Baker* factors, prominent on the surface of this case are the fourth factor and the sixth factor, namely the impossibility of this Court's undertaking independent resolution without expressing lack of respect due coordinate branches of government, and the potentiality of embarrassment to our country from multifarious pronouncements by various departments on one question"). See also *Kadic, supra*, 70 F.3d at 249 ("The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests").

* * * *

(3) 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 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 I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000). On September 18, 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 I v. Unocal*, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002). That decision addressed a number of significant issues, including jurisdiction over claims for forced labor and slavery, the "state action" requirement, and the standard for holding corporate actors liable for "aiding and abetting" others in the commission of human rights violations. However, in February 2003 the Ninth Circuit Court of Appeals granted a motion for rehearing *en banc*. *Doe I 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) and is not reproduced here.

(4) Flores v. Southern Peru Copper Corp.

Eight residents of Peru sued an American company alleging that pollution from the company's mining and refinery operations in and around Ilo, Peru, had caused their asthma and lung disease. Plaintiffs claimed that defendant's "acts of egregious pollution violated their rights to life, health, and sustainable development." The U.S. District Court for the Southern District of New York dismissed the complaint, *Flores v. Southern Peru Copper Corporation*, 253 F.Supp.2d 510 (S.D.N.Y. 2002). Excerpts from the opinion are set forth below (footnotes and citations have been omitted).

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* * * *

. . . [P]laintiffs have not demonstrated that high levels of environmental pollution, causing harm to human life, health, and sustainable development within a nation's borders, violate any

well-established rules of customary international law. While nations may generally agree that human life, health, and sustainable development are valuable and should be respected, and while there may be growing international concern over the impact of environmental pollution on humanity, plaintiffs have not demonstrated any general consensus among nations that a high level of pollution, causing harm to humans, is universally unacceptable.

* * * *

. . . If anything, nations generally agree that the appropriate balance between economic development and environmental protection is a matter that may be determined by each nation with respect to the land within its borders. . . .

* * * *

. . . Since I find no prohibition under international law dealing with environmental conduct within a nation's borders, I need not decide whether such a prohibition would apply to private actors as well as state actors, nor need I decide whether plaintiffs have alleged sufficient facts to support a finding that Southern Peru was a state actor. Defendant's motion to dismiss for lack of federal subject matter jurisdiction and failure to state a claim is granted.

* * * *

(5) Abdullahi v. Pfizer, Inc.

Nigerian citizens brought an action under the Alien Tort Statute against the pharmaceutical company Pfizer, Inc., to recover damages for grave injuries allegedly suffered as a result of the administration of an experimental antibiotic ("Trovaflozacin Mesylate") used to combat outbreaks of bacterial meningitis, measles, and cholera in Kano in northern Nigeria. They alleged violations, inter alia, of the Nuremberg Code, the Helsinki Declaration, the International Covenant on Civil and Political Rights, and customary international law. On motions to dismiss for failure to state a claim, and

for *forum non conveniens*, the U.S. District Court for the Southern District of New York held that, even though the Covenant is a non-self-executing treaty and therefore cannot itself give rise to a private right of action, it was sufficient for plaintiffs to refer to that treaty, and the other named international instruments, in framing their complaint. "[T]his Court has jurisdiction over this action so long as plaintiffs can allege an international law violation as evidenced by principles of those agreements. . . ." *Abdullahi v. Pfizer, Inc.*, 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. 2002), at 4. While the court also held that the conduct in question "does not constitute an international law violation for which a private party may be held liable," it concluded that Pfizer and the former Nigerian government were "joint participants" in the acts at issue, so that plaintiffs had adequately alleged that Pfizer acted as a "state actor" for purposes of stating a claim under the Alien Tort Statute. Applying the doctrine of *forum non conveniens*, the court conditionally dismissed the complaint in light of its determination that the courts in Kano could serve as an acceptable alternative forum and Pfizer's undertaking that it was "amenable to process" there.

(6) Other Cases

(i) As discussed in *Digest 2001*, 326–334, on October 25, 2001, the United States requested rehearing and rehearing *en banc* in *Alvarez-Machain v. United States of America*, 266 F.3d 1045 (9th Cir. 2001), which held that Dr. Alvarez-Machain could sue the United States for false arrest and that his transborder arrest was actionable under the ATS. 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).

(ii) Four refugees from Bosnia-Herzegovina brought an action for torture, cruel, inhuman or degrading treatment, arbitrary detention, war crimes, crimes against humanity, genocide, and various torts under Georgia law against a

former Bosnian soldier who allegedly committed acts of brutality against them in detention facilities during the "ethnic cleansing" campaign directed against Bosnia's non-Serb population. When defendant failed to appear, and following a bench trial, the district court entered judgment in favor of plaintiffs for compensatory and punitive damages in the amount of $140 million. *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002). Excerpts below from the accompanying opinion of the court and finding of facts provide the court's analysis of its jurisdiction over each of the claims under the ATS and TVPA, including defendant's liability for "aiding and abetting" others for committing acts in violation of international law.

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* * * *

Plaintiffs have shown, as to each of them individually, that defendant Vuckovic committed the following violations of customary international law, which confer jurisdiction, and establish liability, under the ATCA: torture; cruel, inhuman or degrading treatment; arbitrary detention; war crimes; and crimes against humanity.

* * * *

. . . Plaintiffs have demonstrated that Vuckovic acted in concert with others in committing many of the abuses suffered by plaintiffs.

* * * *

United States courts have recognized that principles of accomplice liability apply under the ATCA to those who assist others in the commission of torts that violate customary international law. Similarly, the Senate report on the TVPA notes that that statute is intended to apply to those who "ordered, abetted, or assisted" in the violation. Principles of accomplice liability are well-established under international law. Relevant international conventions explicitly provide that those who assist in the commission of acts prohibited by international law may be held individually responsible. Article 7(1) of the ICTY Statute, for example, states that "[a] person who planned, instigated, ordered, committed or otherwise

aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present statute [grave breaches of the Geneva Conventions of 1949, violations of laws or customs of war, genocide or crimes against humanity] shall be individually responsible for the crime."

* * * *

The evidence demonstrated that Vuckovic not only participated directly in committing human rights violations against the plaintiffs and others detained with them, but also that the defendant actively encouraged, aided, and even supervised the commission of human rights abuses by other guards at the detention facilities at which the plaintiffs were held. By his actions and words, Vuckovic associated himself with the brutality of other guards who also violated the plaintiffs' rights and caused them serious injuries. Vuckovic is also responsible for the actions of his associates. Id. 1344–45, 1355–1356

* * * *

(iii) The survivors of three American nuns and one layperson who were abducted, tortured and murdered in El Salvador by five members of the Salvadoran national guard, brought suit under the Torture Victims Protection Act against the former director of the national guard and the former defense minister. In affirming a jury verdict and judgment in favor of the defendants, the Court of Appeals for the Eleventh Circuit addressed, as a case of first impression, the issue of command responsibility as a basis for liability under the TVPA. *Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002). Footnotes and citations have been omitted from the excerpts provided below.

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* * * *

The essential elements of liability under the command responsibility doctrine are: (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime;

(2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes. Although the TVPA does not explicitly provide for liability of commanders for human rights violations of their troops, legislative history makes clear that Congress intended to adopt the doctrine of command responsibility from international law as part of the Act. Specifically identified in the Senate report is *In re Yamashita*, 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946), a World War II era case involving the command responsibility doctrine in habeas review of the conviction of a Japanese commander in the Philippines by an American military tribunal. *See* S. Rep. No. 102–249, at 9 (1991). Describing *Yamashita*'s holding, the Senate Report stated that the Supreme Court found a foreign general "responsible for a pervasive pattern of war crimes (1) committed by his officers when (2) he knew or should have known they were going on but (3) failed to prevent or punish them." *Id.* In the years since *Yamashita* and the passage of the TVPA, the International Criminal Tribunals for the Former Yugoslavia and Rwanda have been established, and their statutes contain language providing for imposition of command responsibility on substantively identical grounds to those enunciated in *Yamashita*. . . .

* * * *

. . . *In re Yamashita* did not explicitly address the allocation of the burdens on the elements of command responsibility. Nor is there any indication that the Court there ever considered how to allocate the burdens of production or persuasion in future command responsibility trials. . . .

The recently constituted international tribunals of Rwanda and the former Yugoslavia have applied the doctrine of command responsibility since *In re Yamashita*, and therefore their cases provide insight into how the doctrine should be applied in TVPA cases. Recent international cases consistently have found that effective control of a commander over his troops is required

before liability will be imposed under the command responsibility doctrine. The consensus is that "[t]he concept of effective *control* over a subordinate in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised is the threshold to be reached in establishing a superior-subordinate relationship. . . ." *Prosecutor v. Delalic* (Appeals Chamber ICTY, Feb. 20, 2001) ¶ 256; *accord id.* at ¶ 266; *Prosecutor v. Aleksovski*, Judgment (Appeals Chamber ICTY, March 24, 2000) ¶ 76; *Prosecutor v. Blaskic,* Judgment (Trial Chamber ICTY, March 3, 2000) ¶ ¶ 295, 302 ("Proof is required that the superior has effective control over the persons committing the violations of international humanitarian law in question, that is, has the material ability to prevent the crimes and to punish the perpetrators thereof."); *Prosecutor v. Kayishema*, Judgment (Trial Chamber ICTR, May 21, 1999) ¶ 229 (stating that the "material ability to control the actions of subordinates is the touchstone of individual responsibility under Article 6(3)"); *Prosecutor v. Delalic*, Judgment (Trial Chamber ICTY, Nov. 16, 1998) ¶ ¶ 377, 378; *Prosecutor v. Akayesu*, Judgment (Trial Chamber ICTR, Sept. 2, 1998) ¶ 491. Many of these cases dealt with the situation converse to the one presented here, i.e., where a superior without *de jure* command was accused of having *de facto* control over the guilty troops. These cases emphasize, nonetheless, that the command responsibility theory of liability is premised on the actual ability of a superior to control his troops. A reading of the cases suggests that a showing of the defendant's actual ability to control the guilty troops is required as part of the plaintiff's burden under the superior-subordinate prong of command responsibility, whether the plaintiff attempts to assert liability under a theory of *de facto* or *de jure* authority. *Prosecutor v. Delalic* (Appeals Chamber ICTY, Feb. 20, 2001) ¶ 196 ("Effective control has been accepted, including in the jurisprudence of the Tribunal, as a standard for the purposes of determining superior responsibility. . . . The showing of effective control is required in cases involving both *de jure* and *de facto* superiors."). Explaining the difference in application of this requirement in *de jure* and *de facto* cases, the same tribunal announced, "In general, the possession of *de jure* power in itself may not suffice for the finding of command

responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced." *Id.* at ¶ 197.

Notably, the tribunal said that *de jure* authority over the guilty troops results in only a *presumption* of effective control. In other contexts, this court has held that a presumption shifts the burden of production with respect to the element it concerns, but not the burden of persuasion. . . . Put another way, *Delalic* indicates that *de jure* authority of a commander over the troops who perpetrated the underlying crime is *prima facie* evidence of effective control, which accordingly can be rebutted only by the defense putting forth evidence to the finder of fact that the defendant lacked this effective control. . . . Thus, although we do not decide the issue, we note that nowhere in any international tribunal decision have we found any indication that the ultimate burden of *persuasion* shifts on this issue when the prosecutor—or in TVPA cases, the plaintiff shows that the defendant possessed *de jure* power over the guilty troops.

To the contrary, *Delalic* provides a strong suggestion that it is the plaintiff who must establish, in all command responsibility cases, that the defendant had effective control over his troops. That a *de jure* commander bears the burden of production on this issue does not affect the ultimate jury instruction that should be given. . . .

* * * *

b. Liability for indirect participation in human rights abuses

(1) In *Cabello Barrueto v. Fernández Larios*, 205 F. Supp. 2d 1325 (S.D.N.Y. 2002), the district court held that a former Chilean military officer could be held civilly liable for damages under the ATS for conspiring or aiding in acts of other Chilean officials, even if he did not actually kill the individual concerned, since "principles of conspiracy and accomplice liability are well established in customary international law." The complaint asserted claims of extrajudicial killing, torture,

crimes against humanity, and cruel, inhuman, or degrading treatment or punishment.

(2) In *Wiwa v. Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002), plaintiffs brought an action under the ATS against two European companies for alleged violations of human rights in connection with the Nigerian government's activities in the Ogoni region of Nigeria during the 1990s. Specifically, they alleged that defendants had recruited the Nigerian police and military to suppress the Movement for the Survival of the Ogoni people ("MOSOP"), of which Ken Saro-Wiwa and John Kpuinen were leaders, and provided logistical support, transportation, and weapons for that purpose. Because of MOSOP's opposition to Shell's oil-excavation activities, Ogoni residents were beaten, raped, shot, or killed. Saro-Wiwa and Kpuinen were hanged in 1995 after conviction for murder by a military tribunal. Plaintiffs included the executors and administrators of their estates.

An earlier decision by the federal district court dismissing the complaint on grounds of *forum non conveniens* was reversed by the Court of Appeals for the Second Circuit. *Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88 (2d Cir. 2000). Following remand, the district court considered and rejected various motions to dismiss, including defendants' arguments that claims under the TVPA preempt similar claims under the ATS and their challenges to the sufficiency of plaintiffs' pleadings in respect of torture, summary execution, arbitrary detention; cruel, inhuman or degrading treatment; crimes against humanity; and the rights to life, liberty, personal security, peaceful assembly, and expression. With regard to the liability of private actors under the ATS and TVPA, the court addressed the issues of "state action" and corporate liability for governmental actions, set forth in excerpts below.

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* * * *

The ACTA and TVPA have similar, albeit not identical, state action requirements. Statutory language makes clear that *all*

claims brought under the TVPA must demonstrate that the alleged violations were perpetrated "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350, note, § 2(a). . . .

The ACTA's state action requirement is defined by precedent and is more complex. In *Kadic I*, the Second Circuit described three categories of international law violations: "(a) genocide, (b) war crimes, and (c) other instances of inflicting death, torture, and degrading treatment." *Kadic I*, 70 F.3d at 241. With respect to the first two categories, the *Kadic I* court held that individuals could be held liable for these torts without any showing of state action. *Id.* at 241–42, 244. With respect to the third category, the appeals court held that "torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by the state officials or under color of law." *Id.* at 243. This limitation is not absolute. Language used by the *Kadic I* Court did not entirely foreclose the possibility that individuals could be held liable for "other instances of inflicting death, torture, and degrading treatment" without a showing of state action.

Plaintiffs argue that the alleged "crimes against humanity" committed by defendants do not require a showing of state action because the alleged crimes fit into the narrow category of "death, torture, and degrading treatment" that, under *Kadic I*, does not require a showing of state action. The *Kadic I* court did not, however, give any examples of "crimes against humanity" that would fall into the third category but not require a showing of state action. I conclude that none of the crimes plaintiffs allege in the instant case plausibly fit into that category. Indeed, the crimes against humanity plaintiffs allege—summary execution, arbitrary imprisonment, and persecution of a group based on political grounds—all fall squarely within the category of international law violations that require a showing of state action, pursuant to *Kadic I*. *Id.* at 243 ("[T]orture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law.") It would not be reasonable for a claimant to be required to plead state action to assert a claim for summary execution or torture, but not to be required to plead state action

to assert a lesser crime such as assault, arbitrary detention, or political persecution.

For these reasons, the Court concludes that plaintiffs must demonstrate state action in order to proceed with their ATCA and TVPA claims.

To determine whether a private actor acts under color of law in the context of a claim under ATCA and the TVPA, the Court must look to the standards developed under 42 U.S.C. § 1983. "A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid." *Id.* The relevant test in this case is the "joint action" test, under which private actors are considered state actors if they are "willful participant[s] in joint action with the State or its agents." . . .

In order to meet this burden in the instant case, plaintiffs have presented two theories of "joint action" that would satisfy the state action requirement. First, they contend that the facts alleged demonstrate a substantial degree of cooperative action between corporate defendants and the Nigerian government in the alleged violations of international law. Second, they argue that the facts demonstrate that Shell Nigeria and the Nigerian government engaged in significant cooperative action that violated plaintiffs' rights, and that corporate defendants had sufficient knowledge of this conduct that they may be held liable for Shell Nigeria's conduct. The Court finds that plaintiffs have pled facts that support their first theory of "joint action" and have therefore demonstrated that corporate defendants acted under color of law in the commission of acts alleged by plaintiffs to have violated international law. The Court need not consider plaintiffs' second theory of state action.

In their Amended Complaint, plaintiffs allege various acts that, if proven, would demonstrate "a substantial degree of cooperative action between" corporate defendants and Nigerian officials in conduct that violated plaintiffs' rights. . . . Plaintiffs' allegations suffice to support a claim that defendants were "willful participant[s] in joint action with the state or its agents," and can hence be treated as state actors for the purpose of the ACTA.

Defendants argue that plaintiffs must demonstrate that Royal / Dutch Shell acted in concert with the Nigerian government with respect to each human rights violations allegedly committed against each plaintiff, and have failed to do so in their Amended Complaint. The Court disagrees for three reasons. First, plaintiffs have alleged that defendants jointly collaborated with the Nigerian government in committing several of the claimed violations of international law, such as planning the arbitrary arrest and killing of Ken Saro-Wiwa and John Kpuinen, the attempted bribery of Owens Wiwa, and bribery (or attempted bribery) of witnesses to give false testimony against Saro-Wiwa. Second, under section 1983 jurisprudence, individuals engaged in a conspiracy with government actors to deprive others of their constitutional rights act "under color of law" to commit those violations. . . . Section 1983 case law does not require plaintiffs' complaint to allege that private actors and state actors acted in concert to commit each specific act that violates plaintiffs' rights. . . . Third, Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include only "a short and plain statement of the claim showing that the pleader is entitled to relief." . . . Rather, plaintiffs are required to provide "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* The allegations in the Amended Complaint concerning the joint conduct of defendants and the Nigerian government are sufficient to satisfy Rule 8(a)(2), and therefore to survive a challenge pursuant to Rule 12.

* * * *

See also, *Doe v. Unocal*, G.3.a.(3); *Sarei v. Rio Tinto PLC*, G.3.a.(2); and *Abdullahi v. Pfizer, Inc.*, G.3.a.(5).

c. Forum non conveniens

(1) In *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2nd Cir. 2002), the Second Circuit Court of Appeals affirmed the dismissal of two class actions against Texaco, Inc., brought by residents of Ecuador and Peru alleging environmental and personal

injuries arising out of Texaco's oil exploration and extraction operations in the Oriente region of eastern Ecuador between 1964 and 1992. The complaints sought money damages under theories of negligence, public and private nuisance, strict liability, medical monitoring, trespass, civil conspiracy, and violations of the ATS. The decision of the district court dismissing the complaints on the ground of *forum non conveniens* is summarized at *Digest 2001* at 336–37.

On appeal, the Second Circuit affirmed. The court held that the district court had not abused its discretion in determining that the Ecuadorian courts provided an adequate alternative forum for plaintiffs' claims, since "[t]he record shows that several plaintiffs have recovered judgments against TexPet and PetroEcuador for claims arising out of the very facts here alleged. Other U.S. courts have found Ecuador to be an adequate forum for hosting tort suits." Considering the balance of private and public interest factors, the court said that the former include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." The court concluded:

> We find no abuse of discretion in the district court's conclusion that these interests "weigh heavily" in favor of an Ecuadorian forum. The relative ease of access to sources of proof favors proceeding in Ecuador. All plaintiffs, as well as members of their putative classes, live in Ecuador or Peru. Plaintiffs sustained their injuries in Ecuador and Peru, and their relevant medical and property records are located there. Also located in Ecuador are the records of decisions taken by the Consortium, along with evidence of Texaco's defenses implicating the roles of PetroEcuador and the Republic. By contrast, plaintiffs have failed to establish that the parent Texaco made decisions regarding oil operations

in Ecuador or that evidence of any such decisions is located in the U.S.

With regard to public interest factors, the court said these include "administrative difficulties associated with court congestion; the unfairness of imposing jury duty on a community with no relation to the litigation; the interest in having localized controversies decided at home; and avoiding difficult problems in conflict of laws and the application of foreign law." It concluded the district court had been correct in determining that these factors weighed in favor of dismissal.

(2) The U.S. District Court for the Southern District of New York established a heightened degree of deference due for the plaintiff's choice of forum in human rights cases in *Wiwa v. Anderson*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 28, 2002). The court denied a motion to dismiss plaintiff's claims based on the Alien Tort Claims Act, 28 U.S.C. § 1350, finding that federal human rights statutes express a policy favoring retention of jurisdiction and place a heightened burden on the defendant to establish that the forum non conveniens motion should be granted.

d. Effect on U.S. foreign policy interests

(1) In *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (*supra* at G.3.a.(2)), the U.S. District Court for the Central District of California ruled that all claims brought by plaintiffs against an international mining company for damage to the environment in Papua New Guinea must be dismissed on the basis of the political-question doctrine.

(2) In *Doe. v. ExxonMobil*, an action filed in the U.S. District Court for the District of Columbia (Civ. No. 01–1357 (LFO) under the ATS and TVPA, plaintiffs brought claims against a U.S. oil company, Exxon-Mobil, for alleged human rights violations occurring at the company's natural gas facility in Aceh, Indonesia. Plaintiffs allege that they were tortured, unlawfully detained, and subjected to other human rights abuses (including kidnapping and sexual violence) by

state security forces working for and paid by ExxonMobil to protect its facility. They contended that ExxonMobil is liable for having knowingly hired, aided and abetted the individuals who committed these abuses. Defendants moved to dismiss on grounds, inter alia, of lack of personal and subject matter jurisdiction, forum non conveniens and nonjusticiability (relying on the act-of-state and political-question doctrines).

By letter of May 10, the district court invited the views of the Department of State in connection with this case, specifically inquiring "whether the Department of State has an opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States." In response, and pursuant to 28 U.S.C. § 517, on May 10 2002, the United States submitted a Statement of Interest including a letter from William H. Taft, IV, Legal Adviser of the Department of State, to the court setting forth the Department's views. As of the end of 2002, the court had not rendered its decision. The text of Mr. Taft's letter is set forth in full below.

This is in response to your letter of May 10, in which you invite the views of the Department of State in connection with the above-captioned proceedings. Specifically, you inquire "whether the Department of State has an opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States, and, if so, the nature and significance of that impact." As you requested, this letter specifically addresses the potential adverse impacts of the litigation on U.S. interests. It does not address the legal issues before the court.

For the reasons detailed below, the Department of State believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle-against international terrorism. It may also diminish our ability to work with the Government of Indonesia ("GOI") on a variety of important programs, including efforts to promote human rights in Indonesia.

However, before describing those concerns, the Department would like to reaffirm its condemnation of human rights abuses by elements of the Indonesian armed forces in locations such as Aceh. Without expressing a view on the allegations in this specific lawsuit, we would like to reiterate that a lasting, peaceful solution to the Aceh conflict that maintains Indonesian sovereignty can only be achieved if the military and police end human rights abuses. The Department will continue to work vigorously to bring such abuses to an end through diplomatic and other means.

With respect to this litigation, it is the Department's considered opinion that adjudication at this time could adversely affect United States interests in two ways, recognizing that such effects cannot be determined with certainty.* First, the GOI may respond to the litigation by curtailing cooperation with the United States on issues of substantial importance to the United States. Second, the litigation's potential effects on Indonesia's economy could in turn adversely affect important United States interests.

Potential Bilateral Effects

In our experience, the government and people of Indonesia react most negatively to any perceived intrusion into areas of Indonesian sovereignty. We anticipate that adjudication of this case will be perceived in Indonesia as a U.S. court trying the GOI for its conduct of a civil war in Aceh. All of the human rights abuses and injuries alleged in the complaint refer to conduct claimed to have been committed by the military and police forces of the GOI. This issue presents special sensitivities for Indonesia

* Much of this assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation. E.g., the nature, extent, and intrusiveness of discovery; the degree to which the case might-directly implicate matters of great sensitivity to the Government of Indonesia and call for judicial pronouncements on the official actions of the GOI with respect to the conduct of its military activities in Aceh; the effect that a decision in favor of plaintiffs might encourage secessionist activities in Aceh and elsewhere in Indonesia; whether the case were to go to a jury and, if so, whether a substantial monetary award were to be imposed on *ExxonMobil*; how other large commercial interests might interpret such a judgment when making investment decisions in Indonesia.

because it is deeply concerned about maintaining national cohesion in the face of strong anti-government secessionist movements in Aceh and elsewhere. The Indonesian response to such perceived U.S. "interference" in its internal affairs could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform.

This lawsuit could potentially disrupt the on-going and extensive United States efforts to secure Indonesia's cooperation in the fight against international terrorist activity. Indonesia is the fourth largest state in the world, with a population of some 210 million. It is also the largest Muslim nation, and serves as a focal point for U.S. initiatives in the ongoing war against Al Qaida and other dangerous terrorist organizations. U.S. counter-terrorism initiatives could be imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests.

The United States also is actively seeking to assist Indonesia in reform efforts aimed at ending the kinds of abuses alleged in this litigation. Through improved training and support of security personnel, as well as judicial reform, these programs are designed to establish a higher degree of professionalism and respect for individual rights. Should the GOI withdraw from these programs in reaction to the litigation, it will impact adversely on our goal of improving Indonesia's treatment of all members of its population, including the people of Aceh. An adverse effect on our human rights objectives is also possible if the GOI were to turn down U.S. companies bidding for new contracts in response to the suit. Working side-by-side with U.S. firms, Indonesian companies and government agencies see the advantages of modern business practices including transparency, respect for contracts, fair labor practices, anti-corruption, efficiency, and competitiveness. We would expect that foreign companies, such as from the People's Republic of China (CNOOC and PetroChina both acquired multi-million dollar rights to Indonesian oil and gas fields this year), would be far less concerned about human right abuses, or about upholding best business practices.

Potential Effects on Indonesia's Stability

Economic and political stability in Indonesia is important to U.S. interests in the region. Given Indonesia's large population, resources, key geographic location, and proximity to key U.S. allies, instability there could create problems ranging from interruption in vital shipping lanes, to refugee outflows, to a new home for terrorists. To the extent this litigation contributes to a worsening of the economic conditions in Indonesia that breed instability it would adversely affect U.S. interests.

Here, timing is an important consideration, because there is already substantial evidence that Indonesia's foreign investment climate is deteriorating. The GOI's Investment Coordinating Board (BKPM), for example, reported that foreign direct investment approvals dropped 88 percent in the first quarter of 2002 (US$ 291.5 million) compared to the first quarter of 2001 (US$ 2.44 billion). Total BKPM foreign direct investment approvals for 2001 also dropped 41.5 percent from the previous year. While the dollar value of investment proposals may be inflated and many proposals do not necessarily result in actual projects, the magnitude of the change confirms that the underlying trend is worsening.

This litigation appears likely to further discourage foreign investment, particularly in extractive industries in remote or unstable areas that require security protection. This, in turn, could have decidedly negative consequences for the Indonesian economy. Revenues from the oil and gas sector, for example, are one of the core contributors to GOI budget revenues, comprising 35 percent of the Indonesian Government's total revenues in 2001. In the last few years, oil and gas revenues (including taxes on the sector) have become an increasingly important source of government funds, comprising 19, 23, and 31 percent of total government revenue respectively in 1998, 1999, and 2000. In addition, oil and gas revenues, which are received in U.S. dollars, offer important protection for the GOI from foreign exchange risk. However, in order to maintain its current level of revenues from the sector, Indonesia must develop new fields, or invest further to maintain production at existing oil and gas fields. More generally, Indonesia must maintain a growing economy to deal with the effects of

the 1997–98 financial crisis, which left the GOI with the costs of a Rp 660 trillion (US $75 billion) bank bailout. Efforts by the U.S. and other donors to enhance Indonesia's fiscal sustainability through debt rescheduling and international lending programs will be undermined if Indonesia cannot sustain its own commitments.

A viable, well-funded central government is also important to U.S. interests in domestic Indonesian policies. Providing more and higher quality public services, especially education and health services, is a key factor in reducing poverty and maintaining political stability. Given its size and large population, any threat to Indonesia's political stability could impact on the security of U.S. treaty allies Australia and Thailand, as well as other countries in the region. Adequate government resources are also necessary to maintain properly trained and equipped security forces that do not need to rely on unregulated and often corrupt business dealings, practices which contribute to actions outside of a central chain of command. Professional personnel are also crucial for making progress on a host of U.S. priorities, including promoting regional stability, countering ethnic and sectarian violence, combating piracy, trafficking of persons, smuggling, narcotics trafficking, and environmentally unsustainable levels of fishing and logging. Litigation in the U.S. that discourages further investment in Indonesia poses a risk of weakening the Indonesian economy in conflict with these U.S. goals.

In this respect, we note that increasing opportunities for U.S. business abroad is an important aspect of U.S. foreign policy. Under the circumstances presented here, the adjudication of these claims could prejudice the Government of Indonesia and Indonesian businesses against U.S. firms bidding on contracts in extractive and other industries.

For the information of the Court, I am enclosing a copy of a letter received on July 15, 2002, from Indonesia's Ambassador to the United States Soemadi Djoko M. Brotodiningrat to Deputy Secretary of State Richard Armitage. In the letter Ambassador Soemadi expresses his government's objections to the continued adjudication of this case. He states that Indonesia views this

litigation as an unacceptable extraterritorial act that will complicate efforts to safeguard foreign investors and will negatively impact Indonesia's struggle to secure economic recovery. He also states that the case will have an adverse impact on effort towards peace in Aceh, which is at an extremely sensitive stage.

H. INDIGENOUS PEOPLE

1. UN Economic and Social Council

The eighth session of the working group of the Commission on Human Rights established to elaborate a draft declaration on indigenous issues met December 2–13, 2002, at Geneva. The report of the working group prepared by chairperson-rapporteur Luis-Enrique Chavez (E/CN.4/2003/02) recorded, among other things, that the representative of the United States had "expressed concern about the reference to self-determination in several places in the draft declaration and therefore preferred a reference to 'internal' self-determination." The alternative text introduced by the United States would combine articles 3 and 31 of the draft declaration and would provide as follows:

> Indigenous peoples have the right to internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social and cultural development. Indigenous peoples in exercising their right of internal self-determination have the internal right to autonomy or self-government in matters relating to their local affairs, including determination of membership, culture, language, religion, education, information, media, health, housing, employment, social welfare, maintenance of community safety, family relations, economic activities, lands and resources management, environment and entry by non-members, as well as ways and means of financing these autonomous functions.

2. Organization of American States

The working group to prepare the draft American Declaration on the Rights of Indigenous Peoples met in special session at the Organization of American States ("OAS") March 11–15, 2002, in Washington, D.C. On March 15, the United States offered its comments on the draft declaration. GT/DADIN/doc.66/02rev.2. The U.S. comments are set forth below in full. This and related documents are available at *www.oas.org* under the OAS Issue "Indigenous Peoples."

Since the earliest days of the Republic, the U.S. has recognized that indigenous peoples have inherent sovereign rights that existed prior to the formation of the United States. This inherent sovereign status exists to this day and is the foundation on which the U.S. builds its relationship with indigenous peoples or, to use the phrase with which most of you have become familiar, our relationship with federally recognized tribes. At the foundation of this government-to-government relationship lies self-determination—the ability of the tribe to control its own affairs.

Last year we said that part of our task as representatives of nation states, in consultation with you, the representatives of indigenous nations, is to forge a common understanding of what we each mean when we use the phrase self-determination. For the U.S. this is a core issue in this document and that we are here today discussing it with you speaks volumes on how our hemisphere has progressed and provides the hope that together we can bring healing to our relationship and to our lands. So for us, the most important part of our task in this section is to create with you an understanding of how self-determination can apply in the unique circumstances of our shared history. Our history has tied us together and only together can we resolve this issue.

Article 14 (1), we believe, speaks to the ability of indigenous peoples to organize and to relate to the State as a group. It is expressed in human rights terminology and so one addition to the text we would want to make would be to express these

rights as a **right of freedom of association, peaceful assembly and expression**. We would also include **"the right to hold opinions without interference"** in the listing. We would delete "according to their values, usages, customs, ancestral traditions, beliefs and religions." The U.S. believes this last phrase is not necessary and could be construed as a limit on fundamental freedoms.

We firmly believe and strongly support the right of federally recognized tribes to express the will of their people and their right to meet together—this is a fundamental part of sovereign status. As we expressed yesterday, however, the U.S. is troubled by the confusion that could result in international human rights jurisprudence in the way these rights are expressed in the draft declaration. When expressed as individual human rights, the meaning and content of these fundamental freedoms are clear and the obligation of the state to respect an individual's fundamental freedoms is equally clear. As a right that applies to a group, however, the meaning of these fundamental freedoms is less clear. For now, the U.S. prefers that this cluster of rights in Article 14 attach to individuals and so we would not, right now, support a formulation that includes "indigenous peoples." But we view this formulation as a problem as we see the need for a provision that speaks to the ability of indigenous peoples to express themselves, to assemble together and to associate together. We will study this issue further and listen with interest to the commentary of states and representatives of indigenous peoples.

On Article 14 (2), the U.S. withdraws its 1999 proposal and supports the chair's text subject to some additions and to the resolution of the issue of individual human rights and collective rights as was just stated. We would adjust the chair's text in the following ways: Indigenous people[s] have the right to **freedom** of assembly, to the use of their sacred and ceremonial areas, **on extended lands subject to the** rights of third parties and **on public lands subject to reasonable accommodation**. They also have the right. . . ."

The U.S. supports inclusion of third party rights. We do not believe that this places any value judgments upon the importance of use and access to ceremonial and sacred sites; rather this

provision is intended to ensure equality. While we understand that there are other instruments which address third party rights, we believe that third party rights must be included here so that the meaning is clear.

On Article 15 (1) the U.S. withdraws its 1999 proposal. Last year in the section on definitions we introduced the following language: **"Indigenous peoples have the right to internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social and cultural development. Indigenous peoples, in exercising their right of internal self-determination, have the internal right to autonomy or self-government in matters relating to their local affairs, including determination of membership, culture, language religion, education, information, media, health, housing, employment, social welfare, maintenance of community safety, family relations, economic activities, lands and resources management, environment and entry by non-members, as well as ways and means of financing these autonomous functions."** We offer this language in this section as well. We do see that the Chair's suggestion is very similar, but believe the language on self-determination lies at the heart of this document and would want to see it included in this section.

On Article 15 (2) we believe it is essential to state that indigenous individuals have the right to participate on an equal basis with other citizens in all national fora, including local, provincial and national elections. This right has been denied all too often. However, it may be useful to move this proposal to the section on human rights as it squarely addresses an individual right and not organizational and political rights.

When State policy or actions are implicated, the U.S. believes that the voice of indigenous peoples should be heard. We offer the following language on that point:

"Where a national policy, regulation, decision, legislative comments or legislation will have substantial or direct effects for indigenous peoples, States should consult with indigenous peoples prior to the taking of such actions, where practicable and permitted by law."

On 16 (2) the U.S. believes that indigenous peoples do have a right to maintain and develop their own decision-making institutions—but that right is both explicit and implicit in the rights to autonomy and self-government. We withdraw our 1999 proposal and offer the following language: **"Consistent with international human rights standards, indigenous people[s] may develop, maintain and reinforce their legal systems, to apply indigenous law to the internal and local affairs of their communities, including systems pertaining to ownership, management and development of lands and natural resources, resolution of conflict with and between indigenous communities, prevention of crime, law enforcement and maintenance of peace and harmony."**

With respect to 16 (3) we believe it is extremely important that individuals understand legal proceedings but believe this provision should be covered in Section 3, Article 8 which addresses linguistic issues.

3. Inter-American Commission on Human Rights: Petition of Mary and Carrie Dann

On December 27, 2002, the Inter-American Commission on Human Rights ("IACHR") issued a final report on a petition filed by Mary and Carrie Dann on April 2, 1993. Report No. 75/02, Case No. 11.140. As described in the final report:

> The petition and subsequent observations allege that Marie and Carrie Dann are members of the Western Shoshone indigenous people who live on a ranch in the rural community of Crescent Valley, Nevada. According to the petition, their land and the land of the indigenous band of which they are members, the Dann band, is part of the ancestral territory of the Western Shoshone people and the Danns and other members of the Western Shoshone are in current possession and actual use of these lands. The Petitioners also contend that the State has interfered with the Danns' use and occupation of

> their ancestral lands by purporting to have appropriated the lands as federal property through an unfair procedure before the Indian Claims Commission ("ICC"), by physically removing and threatening to remove the Danns' livestock from the lands, and by permitting or acquiescing in gold prospecting activities within Western Shoshone traditional territory. Based upon these circumstances, the Petitioners allege that the State is responsible for violations of Articles II, III, VI, XIV, XVIII and XXIII of the American Declaration of the Rights and Duties of Man (the "American Declaration").

In the final report, the IACHR concluded that the United States had "failed to ensure the Danns' right to property under conditions of equality contrary to Articles II, XVII and XIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands. The IACHR reiterated the following recommendations to the United States:

> 1. Provide Mary and Carrie Dann with an effective remedy, which includes adopting the legislative or other measures necessary to ensure respect for the Danns' right to property in accordance with Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands.
> 2. Review its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII and XXIII of the Declaration.

In a note dated November 27, 2002, the United States reiterated arguments set forth in its observations on the preliminary report, filed December 17, 2001, that the IACHR's conclusions were in error because:

> (1) the Danns' contentions regarding the alleged lack of due process in the Indian Claims Commission

> proceedings were fully and fairly litigated in United States Courts and should not be reconsidered here; (2) the Commission lacks jurisdiction to evaluate processes established under the 1946 Indian Claims Act since the Act predates U.S. ratification of the OAS Charter; and (3) the Commission erred in interpreting the principles of the American Declaration in light of Article XVIII of the not-yet-adopted OAS draft declaration on indigenous rights.

The Danns' claim, the United States stated, "is, fundamentally, not a human rights claim, but an attempt by two individual Indians to reopen the question of collective Western Shoshone tribal property rights to land—a question that has been litigated to finality in the U.S. courts." The United States concluded:

> In sum, at all times during the events that gave rise to the petition herein, the United States has acted in full compliance with its domestic and international legal obligations. For these reasons, it respectfully declines to take any further actions to comply with the commission's recommendations.

Excerpts below from the U.S. observations on the preliminary report, filed December 17, 2001, provide the views of the United States on the issues raised in the case.

The full texts of the observations and the note of November 27, 2002, are available at *www.state.gov/s/l/c8183.htm*. The IACHR final report is available at *www.cidh.oas.org/annualrep/2002eng/USA.11140.htm*.

The United States rejects the Commission's Report No. 113/01 of October 15, 2001, in its entirety. The United States respectfully requests that the Commission publish the following Response of the United States in the next Annual Report of the Commission, if Report No. 113/01 is published.

* * * *

II. The Danns' Contentions Regarding The Alleged Lack Of Due Process In The Indian Claims Commission Proceedings Have Already Been Fully And Fairly Litigated In U.S. Courts, So Those Contentions May Not Be Relitigated Here.

The "fourth instance" procedural rule provides that the Commission may not review the judgments issued by domestic courts acting within their competence and with due judicial guarantees. See Case 11.673, *Santiago Marzioni (Argentina)*, Inter-Am. C.H.R. 86, para. 51, OEA/Ser. L/V/II.95, doc. 7 rev (1996). This well-established principle has been applied in both the Inter-American human rights system and the European human rights system.[46] Further, the Commission may not second-guess decisions by national courts applying domestic law, unless the procedures followed by the court were in violation of international law. *See, e.g., Villagran Morales Case, Preliminary Objections*, Inter-Am. Ct. H.R., Judgment of Sept. 11, 1997, Ser. C, No. 32, paras. 17–18.

The instant decision by the Commission constitutes a classic violation of the "fourth instance" rule. Here, the Commission has advanced the same arguments that have been adjudicated, reviewed, and rejected by federal courts in accordance with U.S. federal law. Moreover, as demonstrated below, these procedures were in accord with the provisions of international law—contemporary or otherwise.

A. The Land Claim At Issue Before The Indian Claims Commission Was A Collective Tribal Claim Of The Western Shoshone.

The fundamental error evidenced throughout the Commission decision is its factual assumption that the land claim at issue in the Indian Claims Commission litigation represented an aggregation

[46] The European Court of Human Rights has held that the Court serves to ensure that States observe the rules they undertook to follow. *See Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at para 154 (1978).

of individual claims and not a collective tribal claim of the Western Shoshone. For example, the Commission finds (CRP 104) that "the Dann family has traditionally occupied and used a region broader than their individual ranch and that this constitutes a part of the Dann band land." On this basis the Commission concludes (CRP 140–141) that the Indian Claims Commission process was inconsistent with the provisions of the American Declaration since it did not provide "an effective opportunity to participate individually or as collectives" or require decisions on the basis of "mutual consent."

To the contrary, the claim that was the subject of the Indian Claims Commission proceedings was a collective tribal claim regarding all of the communal tribal lands, not an aggregation of related individual claims. Hence the Danns were not entitled to be individually represented in the Indian Claims Commission proceedings. The Inter-American Commission's assertion to the contrary serves only to undermine the firmly established principle under U.S. law that tribes, not individuals, have authority over communal tribal lands.

As the United States Court of Claims explained in 1976 with respect to the Danns' and other petitioners' attempt to intervene in the Western Shoshone litigation:

> A claim under the Claims Commission Act is not an aggregation of individual claims but a group claim * * * * The suing claimant represents that group interest, and it is reasonable to say that at least prima facie the organized entity "recognized by the Secretary of Interior as having authority to represent such [claiming] tribe, band or group" should be the exclusive suing party. 531 F.2d at 503–504.

Similarly, the United States Court of Appeals for the Ninth Circuit subsequently held in the trespass action:

> The Danns attack the fairness and constitutionality of these [Indian Claims Commission] rulings, but they overlook the fact that the interest they assert in tribal aboriginal title is not a direct property interest of their own. *See*

> F. Cohen, *Handbook of Federal Indian Law* 183–184 (1942). The Danns were simply part of a litigating group with regard to the claims proceeding, and litigation strategy was subject to group decision.

873 F.2d at 1195 (1989).

The Court further stressed that because the interest was tribal, the Danns had no specific rights to the land in question—

> As individual tribal members occupying land under tribal aboriginal title, the Danns or their lineal ancestors could assert no rights excluding the tribe or its members from the land. And because the rights they assert are tribal, the Danns could just as easily lay claim to any of the 22 million acres of aboriginal Western Shoshone land in Nevada as they do to the tracts at issue in this case. The problem with the claim, as we have already pointed out, is that the Western Shoshone have been paid for that title, and it must be deemed extinguished. [Citations omitted]. 873 F.2d at 1196.

The United States courts further found in the trespass litigation that the Indian Claims litigation did not bar the Danns from asserting **individual** aboriginal title as a defense to the trespass action. 873 F.2d at 1201. Nonetheless, on remand before the U.S. District Court for the District of Nevada, the Danns withdrew all remaining claims to title based on individual aboriginal rights. The Danns explained (CRP 52) that they—

> failed to pursue "individual aboriginal title" to the lands in question before domestic courts . . . because doing so would have separated them from the treaty-based Western Shoshone nation claim, ...

They further clarified (CRP 74) that—

> it is the customary nature of land tenure generated by the Western Shoshone people as a whole over centuries, rather

> than the Danns own individual land use pattern, that forms the foundation of the land rights asserted by the Danns.

In short, the Danns had no right to participate individually in the Indian Claims Commission proceedings because the claim at issue was a collective claim of the Western Shoshone. Moreover, the Danns cannot now assert a right to individual aboriginal title as a defense to the trespass action because they abandoned that claim in United States courts, in other words, they never have exhausted domestic remedies.

B. The United States Courts Determined That The Temoak Band Was The Appropriate Representative Party For Maintaining The Claim In The Indian Claims Commission On Behalf Of All Western Shoshone.

A second fundamental factual error committed by the Commission is the erroneous finding (CRP 141) that "it became clear at the time of the Danns' request to intervene that the collective interest in the Western Shoshone territory may not have been properly served through the proceedings pursued by the Temoak Band."

The Danns and other petitioners expressly sought to intervene in the Indian Claims Commission proceedings to challenge the Temoak Band's status as the representative party and to assert allegations that the Western Shoshone had been misled concerning the claim. 706 F.2d 722. The Court of Claims, however, affirmed the Indian Claims Commission's denial of the petition for intervention, finding the Temoak Band to be the appropriate representative of the entire Western Shoshone and the petitioner's allegations of fraud and collusion to be unfounded.

In denying the petition for intervention, the Court of Claims held that:

> The fact is that at bottom all that appellants have demonstrated is that there is a dispute between an undetermined number of supporters of appellants and the organized

> entity, the Temoak Bands, over the proper strategy to follow in this litigation. 531 F.2d at 503.

The Court of Claims also squarely rejected the Inter-American Commission's assertion (CRP 137) that "the determination as to whether and to what extent Western Shoshone title may have been extinguished was not based upon a judicial evaluation of pertinent evidence, but rather was based upon the apparently arbitrary stipulations as between the U.S. government and the Temoak Band." The Court of Claims found that there had been a judicial evaluation of the pertinent evidence during the title phase of the litigation. The Court stated:

> Appellants insist that the subject of title-extinction was never tried, going simply by the concurrent agreement of the parties. But evidence on that issue was contained in the materials presented at the 1957 trial and the Indian appellees asked generally for findings that the Shoshone lands had been taken; the Government consistently maintained that the Indians never owned the lands they claimed and therefore that the question of title-extinction never arose. The Commission made its own determination that the Shoshone lands were held by separate Shoshone entities and that Indian title to the area in question was extinguished by enroachment. 531 F.2d at 500.

The Inter-American Commission also suggests (CRP 137) that the stipulation regarding valuation reached by the parties to the Indian Claims Commission proceeding was "arbitrary." As the Court of Claims explained:

> The parties, instead of having a further trial on the valuation date or dates, then agreed to stipulate that the Nevada lands should be valued as of July 1, 1872, and the [Indian Claims] Commission accepted this agreement as an implementation of its prior finding of extinguishment. **This stipulation was not collusion but a proper application of the admonition that parties to such litigation should**

> **attempt to agree, if possible, upon one or a few valuation dates rather than undertake a burdensome individual computation of value as of the date of disposals of each separate tract.** [Emphasis supplied.] 531 F.2d at 500.

In sum, the Inter-American Commission erred in assuming (CRP 142) that the Temoak Band did not properly serve the interests of the Western Shoshone. U.S. Courts fully examined this question and properly concluded that the Temoak Band was the proper representative of the Western Shoshone and that they had fully litigated their claim.

C. The Danns Were Fully Apprised Of The Status Of The Indian Claims Act litigation.

Yet another factual error committed by the Commission is its assumption (CRP 136) that the Danns were not fully apprised of the litigation strategy that had been employed by the organized entity of the Western Shoshone group. The United States Court of Claims found after examining the record:

> that there is no doubt whatever that appellants [including the Danns] were for a very long time quite aware of the position with respect to this Nevada land taken before the [Indian Claims] Commission by appellee Temoak Bands and its counsel. 531 F.2d at 498–499.

The Commission further errs in concluding (CRP 140) that "[t]here is also no evidence on the record that appropriate consultations were held within the Western Shoshone at the time that certain significant determinations were made." To the contrary, the United States Court of Claims expressly pointed out in its decision that the attorney for the Temoak Band reported that Western Shoshone General Council meetings occurred in 1947, three years before the Western Shoshone action was filed; in 1959, three years before the Indian Claims Commission issued its extinguishment finding; and in 1965, five years before the Indian

Claims Commission issued its decision awarding $26,154,600 to the Western Shoshone. 599 F.2d at 499; *see also* 652 F.2d at 44.

In sum, there can be no doubt that the Danns were fully apprised of the litigation strategy employed by the organized entity representing the Western Shoshone.

D. U.S. Courts Properly Denied The Danns' Request To Intervene In The Indian Claims Commission Proceedings.

Another fundamental factual error committed by the Commission is the finding (CRP 141) that the U.S. Courts "did not take measures to address the substance of [the request for intervention] but dismissed them based upon the expediency of the ICC proceeding."

As the United States Court of Claims emphasized, its orders denying intervention rested upon the unjustified tardiness of the request for intervention. The Danns did not attempt to intervene in the Indian Claims Commission process until 23 years after the litigation had been initiated. As the United States Court of Claims observed in denying the request for intervention:

> the [petition to intervene] was first thrust upon the [Indian Claims] Commission and the Parties in 1974, some 23 years after this Western Shoshone claims was first made to the [Indian Claims] Commission in 1951, some 12 years after the Commission had decided (in 1962) that the United States had extinguished the claimant's title to the large area involved, eight years after the Commission had approved (in 1966) the parties' stipulation as to the valuation date of these lands, about one and one-half years after the Commission had determined (in October 1972) the actual value of the property, and about a month after the problem of offsets had been tried and submitted for disposition. 531 F.2d at 498.

The order denying intervention was not based upon any unwillingness to consider a representational dispute timely

presented or to allow an Indian group to contend that it still retained title to ancestral lands. The Court of Claims explained the process as follows:

> If there are circumstances in which the organized entity fails properly to represent the group, the normal method of redress is through the internal mechanism of the organized entity. And if there be cases in which the internal mechanism is clogged or unavailable then, at least, the members claiming to represent the majority interest are required to make their position formally known to the [Indian Claims] Commission and the other parties as soon as possible—and not after much work has been done, and years have passed, on the unchallenged assumption that the organized entity represents the group.

531 F.2d at 504; *see also* 593 F.2d at 997–999.

In light of the Court of Claims' determination that "no adequate excuse was offered for the long delay," (593 F.2d at 997; see also 531 F.2d at 498–499, 501–502 & n. 13), and the fact that any other litigant in U.S. federal courts would be subject to equivalent procedural requirements concerning timeliness, neither the United States courts procedural rulings nor the preclusive effect that Congress has assigned to the judgment of the Indian Claims Commission offends due process.

In short, the processes employed in the Western Shoshone Indian Claims Commission litigation did provide the due process guarantees required by the U.S. Constitution and reflected in the American Declaration on the Rights and Duties of Man. Indeed, as the Commission itself has acknowledged (CRP 138), those procedures provided the Danns with an even greater opportunity to press their claims than would be available to a non-Indian seeking compensation for the taking of their land. The Danns' contentions regarding the alleged lack of due process in the Indian Claims Commission proceedings were fully and fairly litigated in United States courts and they may not be reconsidered here. It was error for the Commission to assume otherwise.

III. The Processes Established Under The Indian Claims Act Of 1946 Did Not Violate Contemporary Norms Of International Law.

The Commission also erred (CRP 139) in "evaluating these processes" established by the Indian Claims Commission Act of 1946 in light of "contemporary international human rights norms, principles and standards." As discussed above, the Commission has committed fundamental factual errors in its evaluation of the processes in this case. Those erroneous findings led the Commission in turn to erroneously conclude that the processes violated Article II (Right to Equality Before the Law), XVIII (Right to a Fair Trial) and XXIII (right to property) of the American Declaration on the Rights and Duties of Man, if those provisions are interpreted in light of "developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions." In any event, the Commission should not have subjected those historical processes to contemporary norms of international law.

A. The Commission Lacked Jurisdiction To Consider Events Related Solely To The Passage Of The 1946 Indian Claims Commission Act.

It is unclear on what basis the Commission has found jurisdiction over processes established under the Indian Claims Commission Act, which was signed into law on August 13, 1946. Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. Sec. 70 a–v. The Commission contends (CRP 95) "that the events raised in the petitioner's claim occurred subsequent to the States ratification of the OAS Charter." However, the Indian Claims Commission Act only extends jurisdiction to the Indian Claims Commission for claims arising from the taking of the United States of aboriginal lands prior to August 13, 1946. The Commission would not have jurisdiction over events that resulted solely from the passage of that Act, since the Act predates U.S. ratification of the Charter itself. *See Phosphates in Morocco*, P.C.I.J. Ser. A/B, No. 74 p. 10 (1938).

B. Utilization of Contemporary Norms Of International Law Would Violate The Principle of Inter-temporal Law.

Additionally, evaluation of the processes established under the 1946 Indian Claims Commission Act in light of contemporary international norms is an impermissible inter-temporal application of law. Under that principle,

> it is not permissible to import into the legal evaluation of a previously existing situation, or of an old treaty, doctrines of modern law that did not exist or were not accepted at the time, and only resulted from the subsequent development or evolution of international law.

Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, XXX BRIT. YB INT'L L. 5 (1953). *See also* H. Thirlway, *The Law and Procedure of the International Court of Justice*, 1960–1989, LX BRIT. YB INT'L L. 1, 128–129 (1989); *The South West Africa Cases*, I.C.J. REP. 4, 23 (1966).

In this case application of contemporary norms of international law to the Indian Claims Commission process would necessarily violate the principle of inter-temporal law. The Indian Claims Commission proceedings concerning the Western Shoshone were completed in 1977 and the Indian Claims Commission itself was dissolved on September 30, 1978. Indeed, the Inter-American Commission "commends the State" for the "development and implementation of the Indian Claims Commission process" and recognizes that "this process provided a more efficient solution to the sovereign immunity bar to Indian land claims under U.S. law and extended to indigenous communities certain benefits relating to claims to their ancestral lands that were not available to other citizens, such as extended limitation periods for claims." CRP 138.

C. Article XVIII Of The Not-Yet-Adopted OAS Draft Declaration Does Not Reflect Contemporary Norms Of International Law.

Even more surprising is the Commission's determination that "aspects of Article XVIII" of the not-yet-adopted OAS draft

declaration on indigenous rights "reflect general international legal principles developing out of and applicable inside and outside of the Inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples." CRP 129. Clearly, Article XVIII of the draft declaration does not reflect general international legal principles.

In 1999, the Inter-American Juridical Committee advised the OAS that "[i]nternational law does not recognize the indigenous person's right of ownership and use of lands as defined in this article." *Observations and Recommendations of the Inter-American Juridical Committee on the "Proposed American Declaration on the Rights of Indigenous Populations*," OAS Doc. RECIDIN/INF.1/99 (Jan. 29, 1999). The Commission makes no effort to reconcile its position with that of the Inter-American Juridical Committee.

Similarly the United States has consistently expressed its view that draft article XVIII does not reflect general international legal principles. For example, the United States advised the Commission in 1997 that—

> Article XVIII, as drafted by the Commission, contains imprecise language in any attempt to address a wide variety of situations involving land ownership and use. As a result the provision goes significantly beyond existing international law and conflicts with U.S. domestic law in important respects.

Observations and Recommendations of the United States, OAS Doc. RECIDIN/INF.7/99 (Dec. 16, 1997).

Other OAS member States have expressed similar concerns with respect to draft Article XVIII. See Observations and Recommendations by Guatemala on the Proposed American Declaration on the Rights of Indigenous Populations, OAS Doc. RECIDIN/INF.8/99; Observations and Recommendations by Canada on the Proposed American Declaration on the Rights of Indigenous Populations, OAS Doc. RECIDIN/INF.5/99; Observations and Recommendations by Mexico on the Proposed American

Declaration on the Rights of Indigenous Populations, OAS Doc. RECIDIN/INF.9/99.

In short, the United States rejects the application of substantive norms that may or may not emerge in a non-binding document to processes established by the United States in 1946. The OAS draft declaration is still in draft form after six years of negotiations because its terms, including Article XVIII, have not been agreed to by the Member States of the OAS.[47]

IV. The American Declaration Is Not Legally Binding.

The Commission further errs in finding that the United States has violated provisions of the American Declaration. Any competence that the Commission has to consider individual complaints arises through the 1967 amendment of the OAS Charter which established the Commission as a "consultative organ" of the OAS and the 1979 Statute of the Inter-American Commission, approved by OAS resolution No. 447, October 1979, which authorizes the Commission to "examine communications," "address the government of any member state not a party to the Convention for information deemed pertinent," and to "make recommendations." The 1979 Statute in Article 20 further authorizes the Commission to pay particular attention to the observance of the human rights referred to in, *inter alia*, Articles II and XVIII of the American Declaration. This authorization, however, does not turn a non-binding document such as the American Declaration into a treaty that can be considered to be legally binding upon the United States.

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[47] It is not relevant to analyze whether the United States violated general norms of international law since the Commission is not an international tribunal. Moreover, the treaties cited by the Commission (CRP 130) are not binding upon the United States to the disputed situation, since they either were ratified long after the litigation in question was completed (i.e., the International Covenant on Civil and Political Rights and the Convention on the Elimination of Racial Discrimination) or the United States has not ratified those instruments (i.e., the American Convention and ILO 169).

V. Conclusion

The United States takes vigorous exception to the conclusions, *inter alia*, in the Commission's report that: (a) the United States violated any provisions of the American Declaration on the Rights and Duties of Man, and (b) the United States has a legal obligation to comply with the American Declaration or the draft OAS declaration on indigenous rights. At all times during the events that gave rise to the petition herein, the United States acted in full compliance with its domestic and international legal obligations.

I. RULE OF LAW AND DEMOCRACY PROMOTION

1. Community of Democracies

The Community of Democracies held a ministerial meeting November 10–12, 2002, in Seoul, South Korea. The United States has been a member of the convening group for the Community of Democracies from the outset, hosting the inaugural preparatory meeting in Washington, D.C. in 1999. The Community is "a coalition of democratic countries, initiated in 1999 which seeks to advance democracy by providing a forum for the sharing of experiences, identification of best practices and formulation of an agenda for international cooperation. At the inaugural ministerial gathering in Warsaw in June 2000, democratic nations throughout the world pledged their unswerving commitment to upholding democratic principles, values and practices all around the globe." *See www.cd2002.go.kr/about/background.htm*. *See also www.cd2002.go.kr/about/whatsnew_view.php?idx=10* for criteria for participation and procedures.

Remarks by Under Secretary of State for Global Affairs Paula J. Dobriansky to the Roundtable on Consolidating Democratic Institutions at the Community of Democracies Ministerial Meeting, November 11, 2002, described the views of the United States on the issues being addressed.

The full text of Under Secretary Dobriansky's remarks, excerpted below, is available at *www.state.gov/g/rls/rm/2002/16254.htm*.

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Our circle of democracies now embraces almost 140 countries. One generation ago—just one generation—our community would have numbered only about 40 countries.

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As more and more countries adopt democratic practices, the evidence continues to mount: Democracy is not a foreign import or imposition, but an inspiration to men and women all around the world who work for change within their own societies.

Democratic ideas and values speak to a yearning fundamental to every human being—a yearning for freedom and dignity and a better life for themselves and their children.

Some still regard democracy as a luxury that only the world's wealthy can afford. But people in the developing world increasingly see democracy as a necessity. They have discovered that only a combination of democratic and market freedoms can create conditions for well-being on the large scale needed to lift millions out of poverty.

Countries with closed societies, with centrally controlled economies, and with no civil liberties do a poor job of meeting the needs of their citizens for food, shelter, education and health care. That is not ideology. It is fact.

It is also a fact that trade and investment don't tend to flow to countries—even democracies—that are rife with corruption, where civil society remains extremely weak or where leaders, once elected, fail to invest what resources they have in their people.

New democracies created with high hopes can founder if ordinary citizens do not see direct improvements in their lives. . . .

That is why we must work intensively to promote democratic institution-building and the rule of law. That is why we must foster the development of civil societies and independent media. And why it is so important that we do all we can to support good

governance and encourage sound economic management. These systemic efforts can help build confidence among citizens that staying democracy's course will be worth the struggle.

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The 2002 session concluded with the adoption of the Seoul Plan of Action—Democracy Investing for Peace and Prosperity, available at *www.state.gov/g/drl/democ/15259.htm*, and the Statement on Terrorism, *www.state.gov/g/drl/democ/15257.htm*.

2. Hong Kong: Article 23 of the Basic Law

On November 21, 2002, the United States issued a press statement concerning the preservation of rights of the people of Hong Kong under the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted on April 4, 1990, by the Seventh National People's Congress of the PRC at its Third Session. The Basic Law entered into effect July 1, 1997, upon Hong Kong's reversion to the sovereignty of the People's Republic of China.

The full text of the press statement is available at *www.state.gov/r/pa/prs/ps/2002/15393.htm*.

The United States and Hong Kong share a broad commitment to preserving the greatest possible degree of autonomy for Hong Kong and its success as a model of free market capitalism. Congress explicitly endorsed these goals in the U.S.-Hong Kong Policy Act of 1992. President Bush, following his October 25 meeting with Chinese President Jiang Zemin, expressed his interest in the preservation of the rights of the people of Hong Kong.

We have been carefully following the debate on Article 23 of the Basic Law. The Hong Kong people and the international community have raised serious concerns about the proposed legislation. We are encouraged that the Hong Kong Government has taken to heart some of their proposals, and has paid particular

attention to crafting language so as to offer assurances that international standards of human rights will be fully protected. Public discussion in Hong Kong has identified some key areas requiring clarification or review. These include:

- proposed extension of treason, sedition, secession, and subversion criminal offenses to permanent residents, whether inside or outside Hong Kong, without regard to their nationality or legal domicile;
- new restrictions on foreign political organizations that could compromise the integrity and independence of Hong Kong's legal system and function of civil society;
- a proposal for newly-established emergency powers that does not include sufficient checks and balances to ensure adequate oversight; and
- new uncertainty about the parameters of "unlawful disclosure" of state secrets.

We believe there should be an opportunity for the fullest possible consultation on the draft legislation; effective consultation and public confidence requires the early release of the actual language for public deliberation. We join other members of the international community in encouraging a predictable, transparent, and fair system that will allow all in Hong Kong to continue to enjoy long-standing freedoms and civil liberties that have made Hong Kong a success as an international city with its own unique character.

Looking beyond the consultation period, the context for this debate is the Basic Law's call for greater democratization, a goal that requires serious thoughtful attention by the local authorities. A democratically elected government, answerable to the will of the people, is the best way to ensure the protection of fundamental freedoms in Hong Kong.

3. Democracy in Venezuela

On April 18, 2002, Secretary of State Colin L. Powell addressed a Special Session of the General Assembly of the Organization of American States concerning events in Venezuela. The

session was prompted by an attempted military coup against the government of President Chavez on April 11. Excerpts below from Secretary Powell's address provide the views of the United States in support of democracy and the rule of law in Venezuela and propose that the assembly mandate the secretary general to facilitate the national dialogue within Venezuela.

The full text of Secretary Powell's address is available at *www.state.gov/secretary/rm/2002/9537pf.htm*.

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The crisis in Venezuelan democracy that brings us to this Special Session did not begin last week. It built and deepened over many months. Venezuelan democracy has been crippled for too long by polarizing rhetoric and action. For many months, we, and others, have expressed our deep concern about this.

The events of April 11 are a call to all present to reaffirm our collective commitment to democracy and constitutional order. There is no justification for any government to prevent its citizens from exercising their fundamental rights. That said, it is incumbent upon all elements of society to seek resolution of grievances through democratic means. This is the era in our hemisphere of democracies, not dictatorships, of constitutions, not coup d'etats. Coups are a thing of the past, not a pathway to the future.

In a democracy, no one can be above, or outside of, the rule of law. Democracies do not remain democracies for long if elected leaders use undemocratic methods. And defending democracy by resorting to undemocratic means destroys democracy.

If the people of Venezuela are to succeed in building better lives for themselves and better futures for their children, their political leaders now must come together to resolve problems constructively and constitutionally.

My country welcomes the voices in Venezuela calling for a national dialogue. We also agree with Venezuelans who say this is a time for reconciliation, not retaliation. For calm, not hate. A time to respect differences and reflect on mistakes.

We now look to President Chavez to lead his country out of this crisis by acting on those words. And we urge all democratic forces in Venezuela from political life, civil society, the business community, and labor, to participate in that national discussion.

But it is not only the people of Venezuela who must reflect on and learn from what happened there. Our Inter-American Community must do so as well. All of us must examine how we could have used the mechanisms of the Democratic Charter before April 11 to better support Venezuelan democracy.

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In this effort, our Inter-American Democratic Charter and the democratic principles it enshrines must be our guide. We must take a balanced approach as we work together with Venezuela's government and society to advance human rights and fundamental freedoms.

Together, we must also promote a pluralistic system of political parties and organizations in Venezuela. With our support, Venezuelans must ensure that all of their state institutions are subordinate to legally constituted civilian authority.

In keeping with the letter and spirit of the Democratic Charter, I propose that this Assembly mandate our Secretary General to facilitate the national dialogue within Venezuela. And I hope that the people and government of Venezuela will accept the Secretary General's offer of his good offices.

Let us act today to put our Democratic Charter to work for the people of Venezuela.

J. TERRORISM

On November 15, 2002, in the Third Committee, the United States joined consensus on Resolution 57/219, Protecting human rights and fundamental freedoms while countering terrorism. A/RES/57/219. The explanation of the U.S. position is provided below.

The United States joined consensus on draft resolution L.61/Rev.1 because we join with Mexico and other sponsors of this resolution in believing that human rights must be respected by States in their efforts to counter terrorism. However, we continue to believe that, in the UN General Assembly, the 6th Committee is the more appropriate forum to address matters related to terrorism.

In addition, we believe that Preambular Paragraph 3 is inconsistent with Article 2, paragraph 1, of the International Covenant on Civil and Political Rights. That provision expresses the international standard in this area, namely that States have an obligation to protect the human rights of all persons who are both in their territory and subject to their jurisdiction. Preambular paragraph 3 suggests that this obligation is imposed on States concerning "all persons" without qualification or limitation. In the view of my delegation, this is an inaccurate statement of the international legal standard.

We had requested that this paragraph accurately reflect the Covenant standard, but in the interest of reaching consensus, we acquiesced in the use of overly broad language. We, however, do so, with the understanding that this provision will be interpreted consistently with our obligations under Article 2, paragraph 1, of the Covenant.

Cross References

International Criminal Tribunals, **Chapter 3.C.**
Consular notification in criminal cases resulting in death penalty, **Chapter 2.A.**

Chapter 7

International Organizations and Multilateral Institutions

A. GENERAL

Enforcement of Obligations Under the Paris Convention for the Protection of Industrial Property

In response to an inquiry from the UN Legal Counsel concerning the domain name registration for an Internet site which allegedly conflicted with the name of an international organization, the United States agreed to "explore further" with relevant U.S. agencies its obligations under Article 6ter of the Paris Convention for the Protection of Industrial Property ("Paris Convention"), 21 U.S.T. 1583. In a June 2002 note to the UN Legal Counsel, the U.S. Mission to the United Nations provided information on U.S. obligations in this matter, set forth below.*

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

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* Article 6ter provides, in pertinent part:

(1) (*a*) The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official

While practice on implementation of Article 6ter appears to be limited, the commentators on the Convention suggest that Member States enjoy wide latitude in determining how to implement its requirements. . . . In the United States, enforcement of intellectual property rights in specific cases, including in cases involving alleged infringement of rights under Article 6ter, is a private matter for the party concerned. In satisfaction of its obligation under the Convention to prohibit by appropriate measures the use without authorization of emblems, abbreviations and names of international intergovernmental organizations communicated through the intermediary of the International Bureau, World Intellectual Property Organization, the United States has adopted laws which prohibit unauthorized use of infringing trademarks. . . . These laws satisfy U.S. obligations under article 6ter by providing the opportunity for States and international intergovernmental organizations to pursue remedies for the unauthorized use of names and other insignia listed in Article 6ter, including in cases involving use on the internet. Responsibility for evaluating potentially infringing use of trademarks and other intellectual property, and for taking enforcement action when deemed appropriate, however, rests with the party whose interests are affected.

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signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.

(*b*) The provisions of subparagraph (*a*), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection.

* * * *

[3] (*b*) The provisions of subparagraph (*b*) of paragraph (1) of this Article shall apply only to such armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations as the latter have communicated to the countries of the Union through the intermediary of the International Bureau.

* * * *

Moreover, the United States notes that with respect to international intergovernmental organizations, obligations under Article 6ter arise only after receipt of a request for extension of protection through the International Bureau, in accordance with the procedures in Article 6ter (3)(b) and (4). . . . Once notified pursuant to article 6ter, United States authorities would refuse registration, or invalidate, conflicting trademarks consistent with the terms of that article, and would be under an obligation to prohibit by appropriate measures unauthorized use of the notified emblem, abbreviation, or name. But . . . the latter obligation would be met under the laws of general application that the United States has enacted, and it is the responsibility of the party claiming that an infringement has occurred to take action under U.S. law to challenge perceived unlawful use in commerce.

The United States regrets, therefore, that it is unable to provide the direct enforcement assistance requested in this matter.

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B. UNITED NATIONS

1. Report of the Special Committee on the Charter of the United Nations and on Strengthening of the Role of the Organization

On October 10, 2002, United States Adviser John Arbogast addressed the work of the Special Committee on the Charter of the United Nations and on Strengthening of the Role of the Organization, at the Fifty-seventh Session of the United Nations General Assembly, in the Sixth Committee. Mr. Arbogast's statement noted concerns for certain aspects of the Committee's work that "duplicate or significantly overlap work that has been assigned and is being done elsewhere, or are inappropriate on their face." Excerpts below from his prepared statement address areas of work supported by the United States, including analysis of the effect of sanctions on third countries and dispute-prevention and settlement mechanisms.

The full text of Mr. Arbogast's statement is available at *www.un.int/usa/02_150.htm.*

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There has been productive work done in the Special Committee on the question of the third country effects of sanctions. Further, it is partly as a result of the Special Committee's visible efforts on this score that this issue is among those being considered and acted upon by the working group of the Security Council on general issues of sanctions. Among the material and other information made available to the working group was the report of the ad hoc expert group. The expert group, an idea originally suggested by the U.S. delegation, was convened by the Secretary-General to help develop a methodology for assessing third state consequences of sanctions and to explore innovative and practical measures of international assistance to affected states. The report of the expert group, including its conclusion that global and regional financial institutions should play the lead role in both assessing and addressing third state economic consequences, has served to stimulate much more focused thinking on the issues involved, including on the part of the wide range of international organizations and institutions both inside and outside the UN system that are seized with such issues. The work on targeted sanctions referred to by the EU in its statement is but one example of the positive steps that have been taken in this area since the issuance of the expert group's report.

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There has also been productive work done in the Special Committee in the area of dispute prevention and settlement mechanisms, which we believe is a good example of another subject matter on which the Special Committee is particularly well-suited to engage. We congratulate Sierra Leone and the United Kingdom for their work in this regard and we look forward to adoption by the General Assembly of the draft resolution agreed by the Special Committee in its last meeting and set forth in paragraph 162 of its report. My delegation is of the view that these ideas have the potential

to both increase access to and awareness/use of dispute settlement tools and, equally important, to enhance the Organization's early warning and dispute prevention capabilities.

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2. Report of the International Law Commission

On November 1, 2002, Eric Rosand, Deputy Legal Adviser, U.S. Mission to the United Nations, provided the views of the United States on the Report of the International Law Commission on the Work of its Fifty-fourth Session, before the Fifty-seventh Session of the United Nations General Assembly, in the Sixth Committee. Excerpts from Mr. Rosand's prepared statement addressing, among other things, the areas of reservations to treaties and diplomatic protection. are set forth below.

The full text of Mr. Rosand's statement is available at *www.un.int/usa/02_173.htm*.

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Treaties continue to constitute the primary source of international law in our times. We are therefore grateful that the International Law Commission continues to work on guidelines on reservations to treaties. Chapter VII of the Commission's report summarizes the work done at its most recent session. The report also sets out a timetable for the completion of the Commission's work on the subject that seems longer than we had expected when the Commission began its work. We hope that the Commission will find a way to accelerate its work in the present quinquennium.

Turning to the substance, I wish to emphasize that the United States does not support a guideline proposed by the Special Rapporteur that would alter the neutral "post office" concept of the depositary that is enshrined in the depositary articles of the Vienna Convention on the Law of Treaties. The proposed guideline, 2.1.7 *bis* would give the depositary powers to assess reservations for "manifest impermissibility" with a treaty. We

continue to believe that reservations to treaties received by depositaries should be circulated to the parties for whatever action they deem appropriate. If a party deems a reservation to be incompatible with the object and purpose of a treaty, it may take the action specified in the Vienna Convention.

At the beginning of its report, the Commission asked for the views of States as to whether communication of a reservation to a treaty could be made by electronic mail or facsimile. It also wished to know if States knew of any practice in the matter.

Given the substantive rules regarding the timing of the making of reservations (at signature or at ratification), the United States does not see a need for allowing reservations to be made by electronic mail or facsimile. In its depositary capacity, the United States has never received a reservation in either medium.

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Moving on to the important topic of diplomatic protection . . . the United States would like to share some thoughts regarding diplomatic protection of legal persons and shareholders, as well as to offer some views on draft article 4. . . .

With regard to legal persons, we believe that customary international law recognizes the right of a State in its discretion to exercise diplomatic protection on behalf of a corporation registered or incorporated in the State. This right is irrespective of the nationality of the corporation's shareholders, absent evidence of the misuse of the privileges of legal personality. The draft articles should reflect this rule. Although shareholder nationality is generally not relevant to the State's right to exercise diplomatic protection, it should be noted that the United States does take the nationality of shareholders into consideration in deciding whether to exercise its discretion to extend diplomatic protection to a corporation.

The United States also believes that a State may exercise diplomatic protection on behalf of shareholders . . . for unrecovered losses to their ownership interests in a corporation registered or incorporated in another State that is expropriated or liquidated by the State of registration or incorporation, or for other unrecovered direct losses.

With regard to draft article 4, we have previously commented to the Commission that we consider the continuous nationality rule to be well-settled in customary international law. The rule requires that a claim may be admissible only if the person injured as a result of a breach by the respondent State of an international obligation was a national of the claiming State from the time of injury continuously through the time of presentation. And the time of presentation includes the entire period in which the claim is pursued, that is, the entire period until resolution. State practice has not developed to the point that States generally entertain, out of a sense of legal obligation, claims presented by States other than those of nationality at the time of injury and continuously thereafter for the entire period during which the claim is pursued. Thus, any exceptions to the continuous nationality rule cannot have assumed the force of customary international law.

The United States is concerned that draft article 4 is not in accord with the customary international law rule on continuous nationality. The customary international law rule received the "strong support" of States in the discussion held in the Sixth Committee during its fifty-sixth session. . . . Draft article 4, as currently stated, clearly is lex ferenda, as it not only jettisons the requisite link of nationality beyond the date on which presentation of the claim begins, but it also dispenses with any continuity requirement whatsoever. We strongly believe that the ILC should revise this draft article so that it states the customary international law rule.

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With respect to Chapter VII of the Report concerning "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (International Liability in Case of Loss From Transboundary Harm Arising Out of Hazardous Activities)," we commend the ILC, the working group studying this issue, and the Special Rapporteur, for their continuing work on this issue. This topic is of particular importance in the field of international environmental law.

Our general approach to this topic continues to be that international regulation in the area of liability ought to proceed

in careful negotiations concerned with particular topics (e.g., oil pollution, hazardous wastes) or with particular regions (e.g., environmental damage in Antarctica). That work is proceeding in numerous negotiations, in which issues such as environmental impact assessment, prevention, and notification are being given detailed treatment. Although work can and should proceed in these regional and sectoral contexts, we do not perceive a desire among states to develop a global liability regime. Further efforts that take into account and support such regional and sectoral efforts, however, are welcome.

* * * *

I would also like briefly to comment upon the inclusion of the topic of shared natural resources in the Commission's programme of work. We are skeptical that approaching this topic in such a broad manner will be a productive line of study. While the United States can support ILC work on the issue of groundwater, we are concerned that other aspects of transboundary resources are not ripe for ILC study at this time. . . . Transboundary watercourses was a topic that presented specific issues that had often been encountered in practice. Apart from the area of transboundary watercourses, however, real conflicts rarely arise between States on other shared natural resources and when they do arise, States have worked out practical accommodations to fit the specific situations. An attempt to extrapolate customary international law from this divergent practice would not be a productive exercise. Thus, we believe ILC resources would be better utilized through study of groundwater issues, rather than the overly-broad "shared natural resources."

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3. Reform and Payment of U.S. arrears

a. Modernizing UN management

On October 25, 2002, Minister Counselor Howard Stoffer, United States Mission to the United Nations, addressed

Agenda item 114: Improving the Financial Situation of the United Nations, before the Fifth Committee. In excerpts from his remarks below, Mr. Stoffer supported reform efforts and announced the payment of the third and final "tranche" of certain U.S. arrears in accordance with the Helms-Biden legislation, discussed in 3.b. below.

The full text of Mr. Stoffer's remarks is available at *www.un.int/usa/02_170.htm.*

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The U.S. is pleased to see that the Secretary-General has initiated a number of projects to modernize UN management and ensure that resources contributed by Member States are used efficiently and effectively.

We are also pleased that Member States have acted on key initiatives, including safety/security and human resources reform, aimed at protecting and strengthening the Organization's most valuable resource, its staff.

The financial picture appears much improved compared to several years ago, and we would like to express our appreciation to Mr. Connor and his team for managing the UN's complex finances.

I would like to announce that, like other Member States, the United States too is working hard to pay its current assessments as well as its arrears. In fact, we will have paid more than $1 billion to the UN before the end of the year, thus helping to further improve the financial situation:

- **Regular Budget—**The United States, by the end of the month, will have paid $255 million or about 90 percent of its assessment for the year, with the remainder to be paid as soon as our Congress approves our full-year budget.
- **Peacekeeping—**We will pay almost $285 million in peacekeeping assessments by the end of October and are ready to pay another $227 million early next year when the assessment bills are sent out. These amounts also include payments for the War Crimes Tribunals.

- **Arrears**—[T]he recent approval of Tranche III under the Helms-Biden legislation will soon provide $30 million to the UN for peacekeeping arrears and an additional $214 million to other UN system agencies. Another $70 million in peacekeeping arrears was recently paid as a result of the lifting of the "cap" on our assessment rate.

With the Tranche III payments, the United States will complete an important chapter in its relations with the UN.

But our interest in UN reform will not end. We will continue to work with others to ensure that the Organization constantly strives to set priorities as it responds to the demands placed on it by Member States.

* * * *

b. U.S. legislation governing payment of arrears

As noted above, the United States made the third and final payment of certain arrears to the United Nations and other international organizations in 2002 in accordance with applicable U.S. legislation. In October 2002 the Department of State transmitted a statutorily required certification to Congress that all conditions had been met for such payment. The certification was made pursuant to section 941 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal years 2000 and 2001, Pub. L. No. 106–113, 113 Stat. 1501, amended by Pub. L. No. 107–46, 115 Stat. 259 and Pub. L. No. 107–228, 116 Stat. 1350 (commonly referred to as the "Helms-Biden legislation").

The Helms-Biden legislation authorized $819 million in arrears funding for the United Nations and other international organizations (plus $107 million in mutual debt reduction.) Under the legislation, payment of arrears was allowed to be made in three "tranches," each of which was linked to specific conditions, which the Secretary of State was required to certify before the funds could be made available. Former Secretary Albright made the required certification for the first tranche of $100 million in December 1999. The conditions for this first payment, set forth in section 921, related to U.S.

sovereignty and maintaining limitations on the UN's ability to raise revenue.

The tranche II conditions in section 931, as amended, required, among other things, that no member state be assessed more than 22 percent for the UN regular budget and that no member state be assessed more than 28.15 percent for UN peacekeeping activities. Former Secretary of State Madeline K. Albright certified these conditions in January 2001 and October 2001.

The tranche III conditions, in section 941, are reflected in the certification set forth below.

By virtue of the authority vested in me as Secretary of State, pursuant to section 941 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001 (as contained in P.L. 106–113), as amended, I hereby certify that as of October 2002:

1. (A) Each designated specialized agency [defined throughout as the Food and Agriculture Organization, the International Labour Organization, and the World Health Organization] has established an independent office of inspector general to conduct and supervise objective audits, inspections, and investigations relating to the programs and operations of the organization.
   (B) The Director General of each designated specialized agency has appointed an inspector general, with the approval of the member states, and that appointment was made principally on the basis of the appointee's integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.
   (C) Each inspector general appointed under subparagraph (A) is authorized to—
      (i) Make investigations and reports relating to the administration of the programs and operations of the agency concerned;

(ii) Have access to all records, documents, and other available materials relating to those programs and operations of the agency concerned; and

(iii) Have direct and prompt access to any official of the agency concerned.

(D) Each designated specialized agency has procedures in place designed to protect the identity of, and to prevent reprisals against, any staff member making a complaint or disclosing information to, or cooperating in any investigation or inspection by, the inspector general of the agency.

(E) Each designated specialized agency has in place procedures designed to ensure compliance with the recommendations of the inspector general of the agency.

(F) Each designated specialized agency has in place procedures to ensure that all annual and other relevant reports submitted by the inspector general to the agency are made available to the member states without modification except to the extent necessary to protect the privacy rights of individuals.

2. The United Nations is implementing budget practices that result in:

(A) the maintenance of a budget not in excess of the level agreed to by the General Assembly at the beginning of each United Nations budgetary biennium, unless increases are agreed to by consensus; and

(B) the system-wide identification of expenditures by functional categories such as personnel, travel and equipment.

3. (A) The Secretary General and the Director General of each designated specialized agency have used their existing authorities to require program managers within the United Nations Secretariat and the Secretariats of the designated specialized agencies to conduct evaluations of United Nations programs approved by the General Assembly, and of programs of the designated specialized agencies, in accordance with the standardized methodology referred to in subparagraph (B).

(B) (i) The Office of Internal Oversight Services has developed a standardized methodology for the evaluation of

United Nations programs approved by the General Assembly, including specific criteria for determining the continuing relevance and effectiveness of the programs.

(ii) Patterned on the work of the Office of Internal Oversight Services of the United Nations, each designated specialized agency has developed a standardized methodology for the evaluation of the programs of the agency, including specific criteria for determining the continuing relevance and effectiveness of the programs.

(C) Consistent with the July 16, 1997 recommendations of the Secretary General regarding a sunset policy and results-based budgeting for United Nations programs, the United Nations and each designated specialized agency has established and is implementing procedures—

(i) requiring the Secretary General or the Director General of the agency, as the case may be, to report on the results of evaluations referred to in this paragraph, including the identification of programs that have met criteria for continuing relevance and effectiveness and proposals to terminate or modify programs that have not met such criteria; and

(ii) authorizing an appropriate body within the United Nations or the agency, as the case may be, to review each evaluation referred to in this paragraph and report to the General Assembly on means of improving the program concerned or on terminating the program.

(D) It shall be the policy of the United States to seek adoption by the United Nations of a resolution requiring that each United Nations program approved by the General Assembly, and to seek adoption by each designated specialized agency of a resolution requiring that each program of the agency, be subject to an evaluation referred to n this paragraph and have a specific termination date so that the program will not be renewed unless the evaluation demonstrates the continuing relevance and effectiveness of the program.

4. The United States has a seat on the United Nations Advisory Committee on Administrative and Budgetary Questions;
5. The United Nations has in effect procedures providing access by the United States General Accounting Office to United Nations financial data to assist the Office in performing nationally mandated reviews of United Nations operations.
6. (A) The Secretary General—
   (i) has established and is implementing procedures that ensure that staff employed by the United Nations is appointed on the basis of merit consistent with Article 101 of the United Nations Charter; and
   (ii) is enforcing those contractual obligations requiring worldwide availability of all professional staff of the United Nations to serve and be relocated based on the needs of the United Nations.

   (B) The General Assembly has adopted, and the Secretary General has the authority to enforce and is effectively enforcing, a code of conduct binding on all United Nations personnel, including the requirement of financial disclosure statements binding on senior United Nations personnel and the establishment of rules against nepotism that are binding on all United Nations personnel.

   (C) The United Nations has adopted and is enforcing a personnel evaluation system.

   (D) The United Nations has established and is implementing a mechanism to conduct periodic assessments of the United Nations payroll to determine total staffing, and the results of such assessments are reported in an unabridged form to the General Assembly.

   (E) The United States has completed a thorough review of the United Nations personnel allowance system. The review shall include a comparison of that system with the United States civil service system, and shall make recommendations to reduce entitlements to allowances and allowance funding levels from the levels in effect on January 1, 1998.
7. The designated specialized agencies have achieved zero nominal growth in their biennium budgets for 2000–01 from the 1998–99 biennium budget levels of the respective agencies.

8. The practices of each designated specialized agency—
   (A) result in the maintenance of a budget that does not exceed the level agreed to by the member states of the organization at the beginning of each budgetary biennium, unless increases are agreed to by consensus;
   (B) result in the identification of expenditures by functional categories such as personnel, travel, and equipment; and
   (C) result in approval by the member states of the agency's supplemental budget requests to the Secretariat in advance of expenditures under those requests.
9. The share of the total of all assessed contributions for any designated specialized agency does not exceed 22 percent for any single member of the agency.

C. UNITED NATIONS ORGANIZATIONS

1. United States Rejoins UNESCO

On September 12, 2002, President George W. Bush announced in an address to the UN General Assembly that the United States would rejoin the UN Education, Scientific and Cultural Organization ("UNESCO"). A fact sheet released by the White House on the same day described the history of U.S. involvement with UNESCO:

> The United States withdrew from UNESCO in 1984, citing poor management and values opposed to our own. For example, the Director-General of UNESCO at the time advocated for limitations on a free press.
>
> Since reforms began under new leadership in 1999, UNESCO has made significant progress. UNESCO's management structure has been dramatically reformed; senior positions have been slashed by about 50 percent; and capable managers have been brought in to administer key functions including personnel selection and auditing. And it is now dedicated to promoting values such as press freedom and education for all.

> In 2001, the House voted to authorize the $60 million dues payment required for the United States to rejoin UNESCO. . . .

Available at *www.whitehouse.gov/news/releases/2002/09/20020912-4.html*.

The full text of the President's address to the UN, excerpted below, is available at *www.un.int/usa/02_131.htm*.

Mr. Secretary General, Mr. President, distinguished delegates, and ladies and gentlemen: We meet one year and one day after a terrorist attack brought grief to my country, and brought grief to many citizens of our world. Yesterday, we remembered the innocent lives taken that terrible morning. Today, we turn to the urgent duty of protecting other lives, without illusion and without fear.

We've accomplished much in the last year—in Afghanistan and beyond. We have much yet to do—in Afghanistan and beyond. Many nations represented here have joined in the fight against global terror, and the people of the United States are grateful.

The United Nations was born in the hope that survived a world war—the hope of a world moving toward justice, escaping old patterns of conflict and fear. The founding members resolved that the peace of the world must never again be destroyed by the will and wickedness of any man. We created the United Nations Security Council, so that, unlike the League of Nations, our deliberations would be more than talk, our resolutions would be more than wishes. After generations of deceitful dictators and broken treaties and squandered lives, we dedicated ourselves to standards of human dignity shared by all, and to a system of security defended by all.

Today, these standards, and this security, are challenged. Our commitment to human dignity is challenged by persistent poverty and raging disease. The suffering is great, and our responsibilities are clear. The United States is joining with the world to supply aid where it reaches people and lifts up lives, to extend trade and the prosperity it brings, and to bring medical care where it is desperately needed.

As a symbol of our commitment to human dignity, the United States will return to UNESCO.

This organization has been reformed and America will participate fully in its mission to advance human rights and tolerance and learning.

* * * *

2. Observer Status at the World Health Organization: Taiwan

In response to a question from the press, on May 10, 2002, the Office of the Spokesman of the Department of State provided the views of the United States on observer status of Taiwan in the World Health Organization, available at *www.state.gov/r/pa/prs/ps/2002/10085.htm*.

Question: What is the U.S. position on Taiwan observership in the World Health organization (WHO)?

Answer: We support the goal of Taiwan's participation in the work of the World Health Organization (WHO), including observership, and have long worked closely with Taiwan authorities to advance that objective.

We have urged the WHO and its members to find appropriate ways for Taiwan to participate, including observership. We will continue to do so.

* * * *

Cross References

International criminal tribunals, **Chapter 3.C.**

Privileges and immunities of international organizations, **Chapter 10.D.**

Establishment of Global Aids Fund as independent legal entity, **Chapter 13.B.1.**

Chapter 8

International Claims and State Responsibility

A. GOVERNMENT-TO-GOVERNMENT CLAIMS

Claims Against Iraq: United Nations Compensation Commission

After the invasion and liberation of Kuwait, 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 was 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 about 2.6 million claims from claimants worldwide, with an asserted value in excess of $300 billion. The UNCC will continue to review and validate claims over the next two or three years using panels of commissioners who are experts in international law, finance, and other fields.

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 under the UN Oil-for-Food program. As of December 2002, 25 percent of the proceeds of all of Iraq's oil sales were being deposited in a special compensation fund to permit the UNCC to make payments on claims and to fund its ongoing operations.

Fewer than 150 American claims against Iraq remain to be reviewed and awarded by the UNCC. Awards are paid as funds become available in the Compensation Fund. As of December 2002, successful American claimants had received approximately $250 million toward UNCC awards totaling almost $700 million.

B. CLAIMS OF INDIVIDUALS

1. Terrorist Victim Compensation

a. Proposed compensation fund for victims of terrorist attacks

Following September 11, 2001, the United States established a fund to compensate the victims and families of victims from the terrorist attacks of that day. Subsequently, efforts were made to establish a permanent means for compensating victims of terrorism.

On June 12, 2002, Richard L. Armitage, Deputy Secretary of State, wrote to congressional leadership and members of key congressional committees, stating the Administration's preference for any such fund to be modeled after the federal benefit provided to the families of public safety officers killed in the line of duty. Excerpts from the letter set forth below explain the basis for this preference and the Administration's opposition to the use of blocked assets to fund victim compensation or to satisfy judgments, as a matter of foreign policy.

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

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As you know, pending legislation would create compensation funds modeled on the September 11th Victim Compensation Fund for certain victims of terrorist attacks. The Administration believes, however, that based on our experience with managing the September 11th fund, we can make substantial improvements to any future program to compensate victims of international terrorism in order to ensure more equitable, expeditious assistance. Recognizing the many substantial concerns voiced by Americans to the structure of the September 11th fund, the Administration proposes to model any additional program for compensation for victims of international terrorism after the federal benefit provided to the families of public safety officers killed in the line of duty (see 42 U.S.C. 3796), and to fund the program out of the International Affairs 150 Account.

Last fall, recognizing the tremendous sacrifices of our nation's public safety officers, overwhelming majorities in Congress voted to streamline the Public Safety Officer Benefit program and to increase payments under the program from approximately $150,000 to $250,000, indexed for inflation. This program has been a tremendous success in providing prompt compensation to the families of public safety officers killed on September 11th and other public safety officers killed in the line of duty. We believe that designing a program for victims of international terrorism based on the public safety officer benefit model will make the following important improvements to the September 11th Program:

First, this approach will ensure that the victim compensation program provides victims with lower incomes the same awards that it provides to victims with higher incomes. . . .

Second, the claims process under this approach will be quick, streamlined, and simple, in order to help victims' families in their time of need. . . .

Third, the amount of compensation should be on par with that provided to families of public safety officers killed in the line of duty. Like the Public Safety Officer Benefit program, the approach we are proposing would provide fixed amounts of compensation, without offsetting collateral sources or requiring victims to waive rights to civil litigation. (In order to prevent double recovery, the government should have a right of reimbursement if

an individual actually receives compensation from the defendants in a lawsuit for the same injuries for which they were compensated under this program.)

Importantly, this approach would preserve the President's ability to conduct foreign policy. The Administration opposes the use of blocked assets to fund victim compensation or to satisfy judgments. Using blocked assets would preclude their use to pressure regimes to improve their policies on terrorism, risk taxpayer liability for third-party claims against the assets, eliminate their availability to satisfy current U.S. Government claims (currently more than $2 billion), and put at risk diplomatic property.

* * * *

b. Use of blocked assets for terrorist victims compensation

On November 26, 2002, President George W. Bush signed into law the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107–297, 116 Stat. 2322, 15 U.S.C. § 6701 note. Title II of that act, Treatment of Terrorist Assets, made blocked assets belonging to a "terrorist party" available for satisfaction of a judgment against that party for compensatory damages based upon an act of terrorism. This requirement of availability can only be waived by the President on the basis of national security interest. The term "terrorist party" is defined to include individuals and organizations as well as a foreign state designated as a state sponsor of terrorism. Diplomatic and consular property protected by the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, and being used exclusively for diplomatic or consular purposes, is excluded from the definition of "blocked assets." Section 201(c) of the act also made specific amendments for cases against Iran, including a provision for distribution of account balances and proceeds inadequate to satisfy the full amount of compensatory awards against Iran.

Key provisions of the act are set forth below.

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* * * *

SEC. 201. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.

(a) In General.—Notwithstanding any other provision of law, and except as provided in subsection (b), 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) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality 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.

(b) Presidential Waiver.—

(1) In General.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) Exception.—A waiver under this subsection shall not apply to—

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

* * * *

(d) Definitions.—In this section, the following definitions shall apply:

(1) ACT OF TERRORISM.—The term "act of terrorism" means—

(A) any act or event certified under section 102(1) [of this Act]; or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.—The term "blocked asset" means—

(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.—The term "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" and the term "asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) TERRORIST PARTY.—The term "terrorist party" means a terrorist, a terrorist organization (as defined in section

212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state 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).

2. Claims by Vietnamese Employees

On November 8, 2002, the United States moved to dismiss *Hue Thi Nguyen v. U.S.*, Fed. Cl. No. 02–969. In that case, a purported class of Vietnamese who worked for the U.S. government in Vietnam prior to April 30, 1975, claimed they were entitled to back pay and benefits earned before the U.S. withdrawal on that date. The U.S. motion noted at the outset that a similar action had been dismissed on April 25, 2002, for lack of jurisdiction based upon expiration of the statute of limitations. *Buong Van Ho v. U.S.*, 52 Fed.Cl. 664 (2002).

The U.S. motion argued that the court lacked jurisdiction because, "[w]hile plaintiffs base their claims upon alleged employment contracts with defendant, at best, plaintiffs served in their positions by appointment, not contract," and that plaintiffs could not establish any other valid basis for jurisdiction in the court. In addition, it argued that any claims that plaintiffs might have were barred by the statute of limitations and the doctrine of laches, and that they had failed to set forth allegations sufficient to establish that citizens of the United States are accorded the reciprocal right to sue the sovereign of the Socialist Republic of Vietnam ("SRV") in Vietnam's courts, as required by 28 U.S.C. § 2502.

The motion to dismiss also argued that the 1995 agreement reached between the United States and the SRV settling certain claims between the two countries constituted a full and final settlement and discharge of any valid claims presented. Agreement Between the United States of America and the Government of the Socialist Republic of Vietnam Concerning the Settlement of Certain Property Claims, January 28, 1995, State Dep't No. 95–39, KAV No. 4147, 1995

> WL 79523. That section of the motion is set forth below (citations to Complaint omitted).
>
> The full text of the U.S. Motion to Dismiss is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

The Claims Agreement Between the United States and Vietnam Extinguished Plaintiffs' Claims

During the 1990's, the United States and Vietnam began the process of normalizing their relations. As part of this process, in January 1995, the two countries entered into an agreement settling the claims between them. The claims agreement was to "constitute a full and final settlement and discharge" of:

> the claims of Vietnam and nationals of Vietnam (including natural and juridical persons) against the United States arising from the nationalization, expropriation, or taking of, or other measures directed against, properties, rights and interests of Vietnam or Vietnamese nationals prior to the entry into force of this agreement. 1995 WL 79523.

In return, the claims agreement settled all similarly situated claims of the United States and its nationals. Id. To fund these claims, the United States undertook to unblock all of Vietnam's frozen assets, and Vietnam agreed to pay the United States $208,510,481. Id. In other words, when the United States and Vietnam entered into the claims agreement, they settled all claims of the United States and its nationals against Vietnam, as well as all claims of Vietnam and its nationals against the United States.

The United States and Vietnam plainly had the authority to settle such claims. Dames & Moore v. Regan, 453 U.S. 654, 679 (1981). As noted by this Court, it is "established international practice" that sovereigns may settle the claims of their nationals, with or without their consent. Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 244 (1983), aff'd, 765 F.2d 159 (Fed. Cir.), cert. denied, 474 U.S. 909 (1985) (citing Dames & Moore, 453 U.S. at 679–80); see, e.g., S.N.T. Fratelli Gondrand v. United States,

166 Ct. Cl. 473, 479–80 (1964) (plaintiffs' claims barred by peace treaty with Italy).

Thus, Vietnam had the authority to waive the claims of its nationals, and it did so with regard to its nationals' claims against the United States. Pursuant to the claims agreement, if (1) a Vietnamese national, (2) makes a claim against the United States, (3) occurring prior to 1995, (4) arising out of "nationalization, expropriation, or taking of, or other measures directed against" the national's property, rights, or interests, then the claim is barred. 1995 WL 79523.

In this case, there can be no doubt that the claims agreement bars plaintiffs' claims. Plaintiffs allege they are Vietnamese nationals. Plaintiffs assert their claims against the United States. Plaintiffs allege their deprivation occurred in 1975, well before the claims agreement's entry into force. Plaintiffs allege they were deprived of their earnings, so their claims allege an expropriation, taking of, or measure directed against their property, rights, or interests.

In addition, plaintiffs allege that the United States was "specifically prohibited by federal regulation" from paying plaintiffs for their earnings. Thus, plaintiffs' complaint specifically identifies a "measure directed against" plaintiffs' rights and interests, above and beyond the takings and expropriations otherwise alleged.

Plaintiffs' claims, therefore, are barred by the claims agreement, and their complaint must be dismissed for failure to state a claim upon which relief may be granted.

* * * *

3. Claims by Victims of the Nazi Era and Victims' Heirs: Insurance Claims

a. Constitutionality of California Holocaust Victims Insurance Relief Act

In December 2002 the United States filed a brief as *amicus curiae* in the Supreme Court supporting petitioners in *American Insurance Association v. Low*, Nos. 02–722 and 02–723, urging that a petition for a writ of certiorari be granted. At issue was a Ninth Circuit decision upholding the Holocaust

Victims Insurance Relief Act ("HVIRA"), a statute of the state of California. *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832 (9th Cir. 2002) ("Low II"). HVIRA was enacted in an effort to provide a means of assuring compensation for Holocaust victims and their families. Cal. Ins. Code §§ 13800–13807. As part of a broader statutory scheme, it required insurers doing business in the state to disclose, through a public registry, detailed policy information regarding millions of European insurance policies issued by the domestic companies' European affiliates prior to and during World War II. The requirements apply to all Holocaust-era policies, regardless of any connection with California.

In 2001 the court of appeals reversed a decision by the U.S. District Court for the Eastern District of California that had found HVIRA unconstitutional on the ground that HVIRA interfered with the federal government's control over foreign affairs and that it violated the Commerce Clause of the U.S. Constitution. The court of appeals rejected the legal conclusions of the district court, but remanded for consideration as to whether the statute violated due process. 240 F.3d 739 (9th Cir. 2001) ("Low I"). On remand, the district court again enjoined enforcement of the statute, finding that it violated the Due Process Clause of the Fourteenth Amendment to the Constitution by suspending insurers' licenses for not making required disclosures, without enabling them to raise defenses such as a foreign law prohibition on disclosure. 186 F. Supp. 2d 1099 (E.D. Cal. 2001). In reversing this second district court decision, the court of appeals found that HVIRA was not unconstitutional. It took the view that the California statute merely regulated the insurance industry within California. 296 F.3d at 835–836. The court of appeals denied a petition for rehearing en banc on September 9, 2002. 2002 U.S. App. LEXIS 18469 (9th Cir).

Excerpts below from the U.S. brief in the Supreme Court supporting the grant of certiorari set forth the views of the United States that the Constitution precludes extraterritorial state legislation such as HVIRA and that the statute impermissibly intrudes into matters of foreign relations

reserved to the national government. The brief also pointed out that there was a disagreement among the courts of appeals on this issue. The Ninth Circuit Court of Appeals had "expressly declined to follow *Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), which invalidated a similar statute in Florida on due process grounds because of its extraterritorial reach." *See also* discussion of the litigation in Florida and California in *Digest 2000* at 460; *Digest 2001* at 414n. Certiorari was granted in January 2003. 123 S.Ct. 817 (2003). Internal citations to other pleadings have been omitted from the excerpts that follow.

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

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1. a. Since the end of World War II, the United States has committed substantial diplomatic resources toward achieving compensation for the victims of Nazism. The United States and its allies entered into treaties with the post-War governments of Germany and Austria that required them to provide compensation to such persons. More recently, the United States has engaged in extensive international discussions concerning claims arising out of the Holocaust. As a result of those discussions, the United States has entered into executive agreements with Germany and Austria and has issued a joint statement with Switzerland.

With respect to insurance claims, the United States has sought expeditious compensation for Holocaust victims in accordance with the procedures established by the International Commission on Holocaust Era Insurance Claims (ICHEIC). ICHEIC is a voluntary organization formed by five European insurance companies (including petitioners Generali and Winterthur), the State of Israel, Jewish organizations, and the National Association of Insurance Commissioners.[2] It is chaired by former Secretary of State Lawrence

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[2] The United States has observer status in ICHEIC. Several European countries, including Germany, France, Italy, Poland, and the Czech Republic, have observer status as well.

S. Eagleburger. Through ICHEIC, Holocaust victims' insurance claims are processed and checked against European insurers' records in a manner consistent with European data protection laws. The State Department has stated that ICHEIC "should be recognized as the exclusive remedy for all insurance claims that date to the Nazi era" and has "encourag[ed] all insurance companies that wrote policies during the Nazi era to join the ICHEIC." Office of the Spokesman, U.S. Dep't of State, International Commission on Holocaust Era Insurance Claims Begins World-wide Effort to Identify Unpaid Claims (Feb. 15, 2000).

b. The United States' approach to the resolution of Holocaust victims' compensation claims, including insurance claims, is embodied in the executive agreement entered into between the United States and Germany two years ago. That agreement recognizes the creation of a foundation in Germany, funded with some $5 billion from public and private sources, to address Holocaust-era claims against German companies that were not addressed by earlier compensation laws. The German government agreed to supervise the activities of the foundation and to assure that the foundation publicizes its existence (Art. 1, ¶¶ 2,3). It also agreed that all claims by or on behalf of Holocaust victims against German insurance companies would be processed by those companies and the German Insurance Association based on ICHEIC procedures and additional procedures that may be agreed to among ICHEIC, the foundation, and the German Insurance Association. (Art. 1, ¶ 4).

The United States, in turn, agreed to inform its courts that "it would be in [its] foreign policy interests * * * for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies." (Art. 2, ¶ 1). The United States also agreed to "use its best efforts" with state and local governments to achieve an "all-embracing and enduring legal peace" with respect to such claims. (Art. 2, ¶ 2).[3]

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[3] The executive agreement between the United States and Austria, which consists of an exchange of diplomatic notes and annexes, contains nearly identical undertakings. See Exchange of Notes (Jan. 23, 2001), Annex A, ¶ 14; <http://www.usembassy.at/en/policy/annexa.htm>. The joint statement of

2. The State of California has taken a different approach to assuring compensation for Holocaust victims and their families, both in the statute at issue here, the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800 et seq., and several closely related statutes.

HVIRA requires the Commissioner of Insurance to establish a Holocaust Era Insurance Registry containing detailed information on insurance policies issued to Holocaust victims without regard to whether those victims ever lived in California. Cal. Ins. Code § 13803. The public is to have access to the Registry. Ibid. In order to obtain information for the Registry, HVIRA requires all insurers doing business in California to disclose information concerning "life, property, liability, health, annuities, dowry, educational, or casualty insurance policies," that were sold, "directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945." Id. § 13804(a). The disclosure obligation applies "whether the sale occurred before or after the insurer and the related company became related." Ibid. The information that an insurer must disclose includes "[t]he holder, beneficiary, and current status" of each policy, "[t]he city of origin, domicile, or address for each policyholder," and whether and how the policy proceeds have been paid. Ibid. The Commissioner must suspend the license of any insurer that fails to provide the information. Id. § 13806.

HVIRA declares that its requirements are "necessary to protect the claims and interests of California residents," including some 5600 Holocaust survivors living in the State, and "to encourage the development of a resolution to these issues through the international process or through direct action by the State." Cal. Ins. Code § 13801.

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the United States and Switzerland similarly endorses ICHEIC and notes the "potentially disruptive and counterproductive effects of investigative initiatives or the threat or actual use of sanctions on a sub-federal level against insurers, including those that are * * * participants in [ICHEIC]." Joint Statement of the Government of the United States of America and the Government of the Swiss Confederation (Jan. 29, 2000) <http://www.us-embassy.ch/NEWS/jointstatement.htm>.

HVIRA is part of a statutory scheme designed to give California a central role in resolving Holocaust-era claims.[4] Another statute authorizes the Commissioner to suspend the license of an insurer upon finding that it, or any affiliate, failed to pay "any valid claim" on a policy issued to a person, whether or not a resident of the State, who was "a victim of persecution of Jewish and other peoples preceding and during World War II by Germany, its allies, or sympathizers." Cal. Ins. Code § 790.15(a) and (b)(1). It defines a "valid claim" to include claims not paid because the records were lost or the policies were confiscated by the Nazis. Id. § 790.15(b)(3).

A third statute grants state courts venue and jurisdiction over such claims, and abolishes any statute-of-limitations defense if the claim is brought by December 31, 2010. Cal. Civ. Pro. Code § 354.5(b) and (c). It further provides that suits brought on these policies in California courts are "subject to California law" and that forum-selection provisions in the policies are unenforceable. 1998 Cal. Stat. ch. 43, § 2.

* * * *

ARGUMENT

The court of appeals, in upholding a California statute that requires insurers doing business in the State to make sweeping disclosures about transactions that occurred exclusively in Europe between European parties, disregarded constitutional constraints on a State's authority to regulate extraterritorially and to inject itself into matters of foreign relations reserved to the President and Congress. The court of appeals' decision is inconsistent with this Court's decisions articulating those constraints under the Commerce Clause, the Due Process Clause, and the foreign affairs power of the national government, and is in direct conflict with the Eleventh Circuit's recent decision invalidating a similar statute on due

[4] See Assembly Bill No. 600 (Pet. App. 115a–122a) (noting interrelationship of HVIRA, the license-suspension provisions, Cal. Ins. Code § 790.15, and the jurisdictional provisions, Cal. Civ. Pro. Code § 354.5).

process grounds. In addition, the court of appeals' decision undermines the United States' effective conduct of foreign relations, including its continuing efforts to secure compensation for surviving Holocaust victims within their lifetimes. For these reasons, the petitions for a writ of certiorari should be granted.

I. HVIRA VIOLATES CONSTITUTIONAL PROHIBITIONS ON EXTRATERRITORIAL STATE REGULATION

Both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment prohibit a State from regulating activity outside its borders. HVIRA is such an extraterritorial regulation because it focuses exclusively on transactions in Europe before and during World War II and compels the disclosure of information about those transactions although they have "no jurisdictionally-significant relationship to [the State]." Gerling Global Reinsurance Corp. v. Gallagher, 267 F.3d 1228, 1238 (11th Cir. 2001).

A. The Commerce Clause And The Due Process Clause Prohibit States From Regulating Transactions Outside Their Borders

1. Under familiar Commerce Clause principles, California may not require corporations to adhere to its standards in other States or Nations as a condition of doing business in California. See, e.g., BMW of N. America, Inc. v. Gore, 517 U.S. 559, 572 (1996) (a State may not "impose economic sanctions on violators of its laws with the intent of changing the [violator's] lawful conduct in other States"); Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders"). A state law does not cease to be extraterritorial merely because it has some nexus to local persons or activities. Such a law is impermissibly "extraterritorial" for purposes of the Commerce Clause if it has "the practical effect of * * * control[ling] conduct beyond the boundaries of the State." Healy, 491 U.S. at 336.

The Commerce Clause's prohibition on a State's regulation of conduct beyond its borders protects against "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." Healy, 491 U.S. at 336–337. When, as here, a State seeks to project its regulatory regime into the jurisdiction of another Nation, the potential is particularly great for inconsistent legislation and resulting conflict, as well as for interference with United States foreign policy. Cf. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (even federal laws must clearly indicate that they are to apply extraterritorially to "protect against unintended clashes between our laws and those of other nations which could result in international discord").[5]

2. A State is also constrained by the Due Process Clause from regulating contracts or transactions that do not have a significant relationship to its legitimate interests. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818–819 (1985); Home Ins. Co. v. Dick, 281 U.S. 397, 407–408 (1930). In Dick, for example, the Court held that a Texas insurance statute could not, consistent with due process, be applied to invalidate a provision contained in a policy that had been issued in Mexico and was to be performed there. See 281 U.S. at 408. The Court explained that, because all acts relating to the making and performance of the policy occurred outside the State, "Texas was therefore without power to affect the terms of contracts so made." Ibid.; see id. at 408 n.5 ("[A] State is without power to impose either public or private obligations on contracts made outside of the state and not to be performed there."); Shutts, 472 U.S. at 821 (a State cannot apply its own law to "a transaction with little or no relationship to the [State]").

Those cases make clear that a State is not entitled under the Due Process Clause to regulate out-of-state transactions simply because some parties to those transactions reside within the State.

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[5] In addition, the Commerce Clause protects against state regulation, whether or not viewed as extraterritorial, that prevents the United States from "speak[ing] with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979). As discussed below, HVIRA presents that constitutional deficiency as well.

Indeed, the policyholder in Dick was a citizen and permanent resident of Texas, although he engaged in all conduct relevant to the policy while in Mexico. The Court held that Texas did not have a sufficient relationship to the policy to permit the State to regulate it. See 281 U.S. at 408. And, in Shutts, the Court held that Kansas could not apply its law to out-of-state plaintiffs' claims with respect to out-of-state leases, although the defendant did business in the State. See 472 U.S. at 818–819.

B. HVIRA, By Imposing Disclosure Requirements With Respect To Out-Of-State Transactions Between Out-Of-State Parties, Is An Impermissible Extraterritorial Regulation

1. Whether analyzed under the Commerce Clause or the Due Process Clause, HVIRA is an impermissible extraterritorial regulation. Its "practical effect" is to compel "conduct beyond the boundaries of the State," Healy, 491 U.S. at 336—specifically, the collection, compilation, and disclosure of information, presumably located in Europe, concerning transactions that occurred exclusively in Europe between European parties. There is no nexus between those transactions and the legitimate interests of California that permits the State to exercise regulatory authority over them. It is especially evident that HVIRA exceeds the proper legislative jurisdiction of the State because the statute is not one of general applicability that happens to have an extraterritorial effect; instead, HVIRA is specifically directed at transactions that occurred in Europe during a time of international conflict.

The conclusion that HVIRA is an unconstitutional exterritorial regulation is confirmed by "considering how [such laws] may interact with the legitimate regulatory regimes of other States," Healy, 491 U.S. at 336, and Nations. It is plain that HVIRA has the potential to interfere with other jurisdictions' laws limiting the disclosure of private information concerning insurance policies issued in those jurisdictions. As the court of appeals recognized, an insurer that fails to disclose the information required by HVIRA will have its California license suspended, even if "disclosure pursuant to HVIRA [would] violate[] European data protection laws."

2. The court of appeals reasoned that HVIRA is not an impermissible extraterritorial regulation because it does "not seek to regulate the substance of out-of-state transactions." The court viewed HVIRA as "requir[ing] California insurers only to disclose information about their foreign transactions or those of their affiliates."

The court of appeals' reasoning rests on the erroneous premise that "[a] request for information is simply not equivalent" to a regulation. A requirement that a person disclose, or refrain from disclosing, confidential information is regulatory in nature. It imposes a substantive obligation on that person, the violation of which carries adverse consequences. See Dole v. United Steelworkers of Am., 494 U.S. 26, 28 (1990) (describing "rules which require regulated entities to disclose information" as "[a]mong the regulatory tools available to [the] Government"); see also BMW, 517 U.S. at 572–573 (a State may not impose sanctions for failure to follow its disclosure standards in other States); Gallagher, 267 F.3d at 1238 (observing that the disclosure provisions of a similar statute "pertain to, and as a practical matter unquestionably seek to regulate," Holocaust-era policies). Indeed, the tension between HVIRA and European privacy laws belies any claim that disclosure or privacy laws do not regulate or present Commerce Clause and Due Process Clause difficulties.

The court of appeals suggested that HVIRA is constitutionally justified by the State's purpose to "protect[] its residents from insurance companies that have not paid valid claims." A State cannot evade limits on extraterritorial legislation merely by deeming a corporation's conduct abroad relevant to its ability to perform within the State. More broadly, a statute with an impermissible extraterritorial effect cannot be saved by identifying an arguably permissible domestic purpose. In any event, the express purpose of HVIRA is to facilitate the resolution of claims on policies issued in Europe before and during World War II, rather than to assess the fitness of insurers to do business in California today. See Cal. Ins. Code § 13801(d) and (e) (HVIRA is designed "to ensure the rapid resolution of * * * questions" concerning "insurance policies held by Holocaust victims and survivors," so as to "eliminat[e] the further victimization of these policyholders and their families").

. . . By contrast, HVIRA makes no mention of the purpose that the court posited.

* * * *

3. The Ninth Circuit's decision upholding HVIRA under the Due Process Clause cannot be reconciled with the Eleventh Circuit's decision in Gallagher invalidating a similar Florida statute. In Gallagher, as here, the statute required each insurer doing business in the State to disclose extensive information concerning policies issued by itself or its affiliates in Europe between 1920 and 1945. See 267 F.3d at 1229–1230. The Eleventh Circuit held that the statute "exceed[ed] the constitutionally permissible regulatory authority of the Florida legislature" under the Due Process Clause, because the statute required "Florida insurers * * * to produce and compile information regarding transactions between non-Florida residents that occurred entirely outside Florida." Id. at 1234; see id. at 1238 (recognizing that "there is virtually no connection between the State of Florida" and the subject of the disclosure statute, i.e., "insurance transactions involving [domestic insurers'] German affiliates that took place years ago in Germany, among Germany residents, under German law, relating to persons, property, and events in Germany").[6]

* * * *

[6] None of the grounds on which the Ninth Circuit attempted to distinguish Gallagher from this case is persuasive. For example, the Ninth Circuit suggested that the Florida statute, in contrast to HVIRA, sought information directly from "both local and foreign entities." Pet. App. 9a–10a. In fact, the Florida statute, like HVIRA, applies directly only to "[a]ny insurer doing business in th[e] state." Gallagher, 267 F.3d at 1230. In addition, the Ninth Circuit suggested that the Eleventh Circuit did not consider whether the Florida statute could be justified as a means of assessing insurers' fitness to do business in the State. See Pet App. 10a. In fact, the Eleventh Circuit noted the State's "litigating position" that the statute could be so justified, but concluded that the text and structure of the statute did not support that position. See Gallagher, 267 F.3d at 1239–1240. The Ninth Circuit further suggested that the Florida statute was distinguishable because it "contained both disclosure and substantive elements" governing Holocaust-era claims. Pet. App. 10a–11a. The legislation that enacted HVIRA, however, likewise contained other provisions to facilitate the litigation of such claims. See id. at 117a–118a.

II. HVIRA IMPERMISSIBLY INTRUDES INTO MATTERS OF FOREIGN RELATIONS RESERVED TO THE NATIONAL GOVERNMENT

1. This Court has repeatedly emphasized that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979); see, e.g., United States v. Pink, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("The Federal Government * * * is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."). The national government's preeminent role in acting for the United States in the international arena is reflected in the Constitution's express grants of power to Congress, see, e.g., Art. I, § 8, Cls. 1, 3, 11 (powers to "provide for the common Defence," "regulate Commerce with foreign Nations," and "declare War"), and to the President, see, e.g., Art. II, §§ 2, 3 (powers to serve as "Commander in Chief of the Army and Navy," "make Treaties," "appoint Ambassadors," and "receive Ambassadors"), and in its express restraints on state power, see, e.g., Art. I, § 10 (restrictions on States' "enter[ing] into any Treaty, Alliance, or Confederation," "lay[ing] any Imposts or Duties on Imports or Exports," "enter[ing] into any Agreement * * * with a foreign Power," and "engag[ing] in War"). The national government has traditionally exercised such power in dealing with foreign governments with respect to the resolution of claims in the wake of international conflict. See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 679 (1981).

In light of the "imperative[] * * * that federal power in the field affecting foreign relations be left entirely free from local interference," Hines, 312 U.S. at 63, state "regulations must give way if they impair the effective exercise of the Nation's foreign policy." Zschernig v. Miller, 389 U.S. 429, 440 (1968); see Japan Line, 441 U.S. at 449 (state regulations may not prevent the United States from "speak[ing] with one voice when regulating commercial

relations with foreign governments"). This Court has struck down such state regulations, "even in [the] absence of a treaty" or an Act of Congress, Zschernig, 389 U.S. at 441, as inconsistent with the Constitution's assignment to the national government of the authority to conduct foreign relations or, in the commercial area, as inconsistent with the Foreign Commerce Clause. See, e.g., Japan Line, 441 U.S. at 452–453 (foreign commerce); Zschernig, 389 U.S. at 436 (foreign affairs); Chy Lung v. Freeman, 92 U.S. 275 (1875) (same).

2. HVIRA intrudes into matters of foreign relations exclusively reserved to the national government. The resolution of claims arising out of the Nazi era in Europe has long been a subject of United States diplomatic attention. In the context of still-unresolved claims against foreign enterprises arising out of the Holocaust, the President has determined that it is preferable for such claims to be pursued through non-adversarial processes rather than litigation. The President has concluded that such an approach serves the interests of Holocaust victims and their families as well as the United States' interest in cooperative relations with its European allies.

In particular, the United States, in its executive agreements with Germany and Austria and its other recent diplomatic efforts, has encouraged the use of ICHEIC as the exclusive mechanism for resolving Holocaust-era insurance claims. Those agreements do not, of their own force, extinguish or bar any claims that Holocaust victims or their families might assert in court against German and Austrian companies. They do make clear, however, that United States policy disfavors the imposition of further obligations on companies subject to the agreements, whether through regulation or litigation, beyond those contemplated by the agreements themselves. Thus, the executive agreement between the United States and Germany recognizes that it is "in the[] interests" of the two governments for the designated claims process "to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II."

HVIRA threatens to "impair the effective exercise," Zschernig, 389 U.S. at 440, of United States policy with respect to Holocaust-era claims. As explained above, the United States has sought to

achieve voluntary participation in international claims processes and to encourage the exclusive use of those processes as an expeditious, fair, and comprehensive alternative to litigation. State laws such as HVIRA are not laws of general applicability with an incidental effect on the federal government's ongoing efforts. To the contrary, they are expressly and specifically directed at establishing competing processes with their own disclosure requirements and potentially their own forums and remedies for Holocaust-era claims. Such laws impose "a different, state system of economic pressure," Crosby v. National Foreign Trade Council, 530 U.S. 363, 376 (2000), and may impede the implementation and operation of the international claims processes. See, e.g., Joint Statement, note 3, supra, (noting the "potentially disruptive and counterproductive effects" of such laws). At a minimum, such laws "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." Crosby, 530 U.S. at 381. They also generate the very tensions in foreign relations that the United States has sought to avoid. For example, the United States has received protests from Germany and Switzerland concerning HVIRA's application to insurance policies written in those countries.

3. In declining to invalidate HVIRA as inconsistent with the national government's authority over foreign affairs, the court of appeals attempted to distinguish this case from Zschernig. None of its suggested distinction bears on whether HVIRA is an impermissible "intrusion by the State into the field of foreign affairs which the Constitution entrusts in the President and the Congress." Zschernig, 389 U.S. at 432.

For example, the court of appeals observed that the Court invalidated the state probate statute in Zschernig only after the statute had disrupted foreign relations. Nothing in Zschernig suggests that a state statute cannot be invalidated until its adverse impact on foreign relations has been fully manifested. And, in Chy Lung, the Court invalidated a state statute, without any inquiry into its actual impact, on the ground that the statute, by its nature, would create international tension. See 92 U.S. at 279. In any event, as the protests from Germany and Switzerland demonstrate, HVIRA has, in fact, affected the United States' foreign relations.

The court of appeals also sought to distinguish Zschernig on the grounds that HVIRA "involve[s] foreign commerce" and is "not directed at a particular country." To the extent that those observations accurately distinguish Zschernig, they suggest that HVIRA is more, not less, constitutionally problematic. A state statute that interferes with the United States' commercial relations with other Nations may be invalid under both the Foreign Commerce Clause and the foreign affairs power. See National Foreign Trade Council v. Natsios, 181 F.3d 38, 53–55, 68–69 (1st Cir. 1999) (invalidating state statute on both foreign affairs and foreign commerce grounds), aff'd on other grounds, 530 U.S. 363 (2000). Nor need a state statute be "directed at a particular country" to be invalidated under the foreign affairs power. No such statute was involved in Chy Lung or Zschernig. Moreover, HVIRA is clearly directed at insurance policies issued to persons in certain European countries, which explains why it has drawn objections from two of those countries and which makes its interference with foreign affairs even more manifest.

Finally, the court of appeals erred in refusing, based on a misunderstanding of Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298 (1994), to consider the views of the Executive Branch regarding the foreign policy ramifications of HVIRA. See Pet. App. 55a. As this Court has explained, Barclays addressed an unusual situation in which Congress and the Executive had taken divergent positions. See Crosby, 530 U.S. at 385–386. Crosby reaffirms the central importance in other situations of the President's views in exercising his constitutional responsibility "to speak for the Nation with one voice in dealing with other governments." Id. at 381, 385–386.[8]

* * * *

[8] The court of appeals incorrectly viewed the Holocaust Assets Commission Act of 1998, Pub. L. No. 105–186, 112 Stat. 611, as a congressional endorsement of state statutes such as HVIRA. The Act establishes a commission to address the disposition of certain Holocaust-era assets that "came into *the possession or control of the Federal Government*" after January 30, 1933. § 3(a)(1), 112 Stat. 612 (emphasis added). It directs the commission to "encourage the National Association of Insurance

b. Agreement concerning Holocaust era insurance claims

On October 16, 2002, in Washington, D.C., the German foundation "Remembrance, Responsibility, and Future" ("Foundation"), the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), and the German Insurance Association ("GDV") entered into an agreement to implement the Foundation's provisions for payment of previously unpaid Holocaust era insurance claims. Agreement Concerning Holocaust Era Insurance Claims, effective on signing ("Agreement"). The Agreement established procedures for payment of over 100 million Euros previously set aside by the Foundation for the purpose of compensating holders of unpaid or confiscated and not otherwise compensated policies of German insurance companies in connection with Nazi injustice. It also paved the way for transfer of over 175 million Euros from the Foundation to the Humanitarian Fund of ICHEIC.

As noted in the U.S. brief in *American Insurance Association v. Low*, *supra*, the United States has encouraged the recognition of ICHEIC as the exclusive mechanism for resolving Holocaust-era insurance claims. An Executive Agreement with Germany, signed in 2000, required Germany to ensure that unpaid Holocaust-era insurance claims against German insurance companies would be processed

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Commissioners to prepare a report on the Holocaust related claims practices of all insurance companies, both domestic and foreign, *doing business in the U.S.* at any time after January 30, 1933," that issued an insurance policy to "any individual on any list of Holocaust victims." § 3(a)(4)(A), 112 Stat. 612 (emphasis added). It states that the report should include, "to the degree the information is available," the "number of policies issued by each company" to Holocaust victims, the "value of each policy at the time of issue," the "total number of policies and the dollar amounts that have been paid out," and the "total present day value of assets in the [United States] of each company." § 3(a)(4)(B), 112 Stat. 613. Nothing in the Act imposes reporting requirements on insurers under threat of sanctions, confers any new authority on the States to do so, or seeks the sort of private information that may be protected from disclosure under foreign law.

on the basis of ICHEIC procedures and any subsequent procedures agreed upon by ICHEIC, the Foundation, and the GDV. The new Agreement established such additional procedures.

Excerpts below set forth key provisions of the Agreement. Remaining sections include procedures for appeals, payments of awards, distribution of Foundation funds and management of the Humanitarian Fund of the ICHEIC.

The full texts of the Agreement and its eleven annexes are available at *www.icheic.org/eng/press.html*.

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* * * *

— Recognizing that it is in the interest of all parties to this Agreement to have a resolution of the outstanding issues in a non-adversarial and non-confrontational way;

— Confident that ICHEIC, the Foundation and the GDV will provide a just and expeditious mechanism for making payments on individual claims on unpaid or confiscated and not otherwise compensated policies.

The parties have agreed as follows:

Section 1. Scope of the Agreement

(1) The parties to this Agreement agree to work together in a close and trustful cooperation in order (i) to compensate unpaid or confiscated and not otherwise compensated insurance policies of German insurance companies (ii) to ensure that the terms of this Agreement are followed in full by all parties and (iii) to make the claims processing efficient, effective and responsive to claimants.

(2) For this purpose 76,693,784 Euro (150 million Deutschmark) pursuant to Section 9, Paragraph 4, Sentence 2, Number 3, of the Foundation Law and an additional 25,564,594 Euro (50 million Deutschmark) from interest earned by the Foundation's capital pursuant to Section 9, Paragraph 5 of the Foundation Law shall be made available to cover this compensation and the costs as set out in Section 6 (1). Monies from those funds may also be used for the other purpose in each case.

(3) In the event that the funds of 102,258,376 Euro (200 million Deutschmark) should not be completely drawn down after all approved claims and the agreed costs pursuant to Section 6 (1) have been met, the monies not used shall be transferred to the Humanitarian Fund of ICHEIC as created in Section 9, Paragraph 4, Sentence 2, Number 5 of the Foundation Law (hereinafter referred to as the Humanitarian Fund).

(4) If approved claims against German insurance companies cannot be covered by the funds pursuant to Section 9, Paragraph 4, Sentence 2, Number 3 and Paragraph 5 of the Foundation Law, the Foundation shall make available up to 25,564,594 Euro (100 million Deutschmark) from the Fund "Remembrance and the Future" to meet those claims.

(5) The payment of 178,952,160 Euro (350 million Deutschmark) to the Humanitarian Fund pursuant to Section 9, Paragraph 4, Sentence 2, Number 5 of the Foundation Law shall be effected according to the provisions in Section 7 of this Agreement.

Section 2. Eligible Claims

(1) A claim concerning a life insurance policy is eligible for compensation, if

(a) the claim relates to a life insurance policy in force between January 1, 1920 and May 8, 1945 and issued by or belonging to a specific German company and which has become due through death, maturity or surrender; and

(b) the insurance policy was not paid or not fully paid as required by the insurance contract or was confiscated by the German National Socialist Regime or by the government authorities as specified in the definition of Holocaust victim in Section 14; and

(c) the policy (or policies) in question was not covered by a decision of a German restitution or compensation authority. A policy or policies will be considered as having been covered by a decision of a German restitution or compensation authority, where the decision covers the same specific policy or policies as those referred to in the claimant's claim form, except in cases where:

- the claim was rejected by the German restitution or compensation authorities due to their own lack of jurisdiction; or
- the claim was rejected by the German restitution or compensation authorities due to the fact that the claim was made by a person not entitled to claim; or
- the claim was not timely filed; or
- documentary evidence that would have led to a decision in favor of the claimant was previously unavailable but subsequently became available (such as opening of company or government archives); and

(d) the claimant is, in the following order of priority:

- the policy beneficiary or his heir pursuant to the Succession Guidelines (Annex C);
- the policyholder or his heir pursuant to the Succession Guidelines;
- the insured or his heir pursuant to the Succession Guidelines; and

(e) the policy beneficiary or the policyholder or the insured life, who is named in the claim, was a Holocaust victim; and

(f) the claim was lodged before a date mutually agreed by the parties to this Agreement. This date, once agreed, will be appropriately publicized by the parties.

(2) A claim concerning non-life insurance is eligible for compensation, if

(a) the insured event occurred while the policy was in force at the time of the event. Notwithstanding the above, a non-life insurance claim shall not be eligible if it was caused by war unless it can be attributed to racial or religious persecution; and

(b) the claimant is entitled as policyholder or as rightful heir of the policyholder to benefits of the policy notwithstanding the statutes of limitation; and

(c) the benefits of the policy were not paid out, because the policyholder became a Holocaust victim before an original insurance claim could be lodged, or if lodged before it could be settled or the benefits were confiscated by the German National Socialist Regime or by the government authorities as specified in the definition of Holocaust victim in Section 14; and

(d) the damage from the insured event was not compensated or restituted; and

(e) the claim was lodged before a date mutually agreed by the parties to this Agreement. This date, once agreed, will be appropriately publicized by the parties.

* * * *

4. Claims by Persons Held as Prisoners of War by Japan

a. California state law

In addition to the Holocaust Victims Insurance Recovery Act, addressed in *American Insurance Association v. Low*, discussed in 3.a., *supra*, California also enacted a statute permitting World War II forced laborers to sue the companies that benefited from their labor. Cal. Code of Civ. Proc. § 354.6 (1999). That section permits any "prisoner-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" to "recover compensation for labor performed as a . . . Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed." Since enactment of the statute in 1999, suits have been brought by soldiers from the United States and other countries held as prisoners of war by Japan during World War II against the Japanese companies for which they were forced to work during their captivity.

A number of suits under the statute have been dismissed in U.S. federal courts, on grounds urged by the United States in statements of interest filed in the cases. In 2000 the U.S. District Court for the Northern District of California dismissed consolidated claims by Allied prisoners on the ground that they were barred by the 1951 Treaty. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000); *see also* 164 F. Supp. 2d 1153 (N.D. Cal. 2001) (dismissing claims by Philippine prisoners because the Philippines was an Allied power for purposes of the

treaty with Japan). The district court also dismissed claims by non-Allied prisoners, finding that section 354.6 was unconstitutional as applied "because it infringes on the federal government's exclusive power over foreign affairs." 164 F. Supp. 2d 1160, 1164 (N.D. Cal. 2001). *See Digest 2000* at 500–540, *Digest 2001* at 339–340 n. 1. At the end of 2002, the federal cases were pending on appeal to the U.S. Court of Appeals for the Ninth Circuit.

In California state courts, litigation continued during 2002 in two cases, discussed here.

(1) *American soldiers as prisoners of war:* Mitsubishi Materials Corp. v. Superior Court

In *Mitsubishi Materials Corp. v. Superior Court (Dillman, real party in interest)*, Master Docket No. 81 44 30, plaintiffs in cases consolidated in California state courts were former members of the U.S. military held as prisoners of war by Japan during World War II, or the heirs of other POWs. All claims were based on forced labor without pay for various Japanese companies. Defendants in interest had moved the superior court for judgment on the pleadings, arguing, among other things, that the claims were barred by the 1951 Treaty of Peace and that the California legislation exceeded the jurisdictional limits imposed on the states of the United States by the federal Constitution. In October 2000 the United States filed a Statement of Interest in support of defendants' motion. On October 19, 2001, the superior court rejected defendants' motion in an unpublished, two-page order. The court ruled that contradictory interpretations of the Treaty contained in extraneous materials submitted to the court precluded it from interpreting the Treaty as a matter of law.

Defendants moved the California Court of Appeals for interlocutory review. Excerpts below from the Brief of the United States as *Amicus Curiae* in Support of Writ Petition, filed February 14, 2002, provide the U.S. view that the

language of the 1951 Treaty of Peace is clear on its face and precludes the claims at issue. Cross-references to other pleadings in the case have been omitted. The brief also argued that the California statute is preempted, and is, as well, an unconstitutional attempt by California to project its authority over matters outside of its jurisdiction. These latter arguments are addressed in 4.a.(2), below.

The full text of the U.S. *amicus* brief in Mitsubishi is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

I. PLAINTIFFS' CLAIMS ARE BARRED BY THE 1951 TREATY OF PEACE, WHICH WAIVED ALL AMERICAN AND ALLIED NATIONALS' WAR-RELATED CLAIMS AGAINST JAPANESE NATIONALS.

A. The Waiver Of American POW Claims In The 1951 *Treaty Of Peace Is Unambiguous.*

Where the text of a Treaty is clear a court must give the effect to the text. *See Chan* v. *Korean Air Lines, Inc.*, 490 U.S. 122, 134 (1989) ("where the text is clear *** we have no power to insert an amendment"). If the text is unambiguous, the court may not look beyond it to "drafting history" or other extraneous documents that might contradict the text itself. *Ibid.* (because "the result the text produces is not necessarily absurd," "[w]e must thus be governed by the text—solemnly adopted by the governments of many separate nations whatever conclusions might be drawn from the intricate drafting history * * * brought to our attention"); *Maritime Ins. Co. Ltd. v. Emery Air Freight Corn.*, 983 F.2d 437, 440 (2d Cir. 1993) ("there can be no doubt that we may rely on [other methods of interpretation] *only* when there is an ambiguity in the text of the treaty"); Vienna Convention on the Law of Treaties, Article 32 (recourse to extraneous materials appropriate only where applying normal canons of construction "(a) leaves

the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable").[4]

Article 14(b) of the 1951 Treaty of Peace broadly waives all Allied claims arising out of the war, including claims by American nationals against Japanese nationals. The Allied parties to the Treaty, including the United States, expressly "waive *all* * * * claims of the Allied Powers and their nationals arising out of *any* actions taken by Japan and its nationals in the course of the prosecution of the war." Art. 14(a) (emphasis added).[5] Art. 14(b). This text leaves no question that it applies to "all * * * claims" by American "nationals" against "Japan and its nationals." (Fn. omitted)

It is equally clear that claims of prisoners of war regarding the treatment they received during their incarceration are claims arising out of "actions taken * ** in the course of the prosecution of the war." *See In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000) (calling plaintiffs' argument "strained").[7] This language is "strikingly broad." *Ibid.* The Court need not, however, determine the boundaries of the waiver, because claims related to a belligerent's treatment of its prisoners of war fall well within the waiver's outer limits.

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[4] Although the United States is not a party to the Vienna Convention, it recognizes the Convention as an authoritative guide to international common law regarding treaty interpretation. *See*, *e.g*, *Fujitsu Ltd.* v. *Federal Express Corp.*, 247 F.3d 423, 433 (2&QTr. 2001).

[5] The full text of the waiver provision is as follows:

> Except as otherwise provided in the present Treaty, the Al1ied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.
>
> * * * *

[7] Indeed, while the superior court denied defendants' demurrer, the court recognized that plaintiffs' claims arose out of acts taken in the course of prosecution of the war. *See* Order dated May 22, 2000 (noting that plaintiffs argument that the claims "did not arise in the prosecution of war*** is without merit"). See also *Aldrich v. Mitsui & Co.* (M.D. Fla. Jan 28, 1988) No. 87-912-Div-J-12, slip. op. at 3.

All plaintiffs in these cases either were, or assert claims as the heirs of, American "prisoners of war" captured by the Japanese during World War II. *See Dillman v. Mitsubishi Materials Corn.*, No. 814430 (Orange Cty.).[8] Indeed, plaintiffs' prisoner-of-war status is an essential element of their asserted claims under the California forced labor statute, which, with respect to American nationals, only allows claims by "prisoner[s]-of-war." *See* Cal. Code Civ. Pro. § 354.6(a)(2).[9]

As prisoners of war, plaintiffs were entitled to the protections afforded by the Geneva Convention. *See* Convention of July 27, 1929, Relative to the Treatment of Prisoners of War ("1929 Convention"), 47 Stat. 2021, Art. I, Art. 81; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 ("1949 Convention"), 6 U.S.T. 3316, Art. 4.[10] Significantly, under

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[8] In the initial complaint in *Jaeger*, plaintiffs similarly acknowledged that the forced labor that is the subject of their suit was performed by United States servicemen while held by Japan as prisoners of war during World War II. *See Jaeger* v. *Mitsubishi Materials Corp.*, No. 814594, (alleging that "prisoners of war taken by the Japanese were enslaved and forced to work for years under inhumane conditions for private Japanese business entities"). These facts have been omitted from their Amended Complaint, though the Amended Complaint does impliedly reference plaintiffs' "prisoner of war" status in the allegation that plaintiffs' decedents were "forced labor victims" under the California statute. For the reasons stated in the text, the admissions of plaintiffs' original Complaint are unnecessary to resolving the legal question presented but plaintiffs should, in any event, be judicially estopped from denying the truth of the allegations of their original complaint.

[9] None of the plaintiffs allege they fall within the other classes of potential plaintiffs under the California statute: "person[sl taken from a concentration camp or ghetto" or "member[s] of the civilian population conquered by the Nazi regime" and its allies. Cal. Code Civ. Pro. § 354.6(a).

[10] Japan and the United States were signatories to the 1929 Geneva Convention, *Yamashita v. Styer*, 327 U.S. 1, 23 (1946), and were bound by its terms during World War II, *see id.* at 73 n. 36 (Rutledge, J. dissenting) (noting that, though Japan had not ratified the Convention before the War, Japan and the United States had agreed to adhere to its provisions). Although the 1949 Geneva Convention post-dated World War II it is a multilateral treaty negotiated at roughly the same time as the 1951 Treaty of Peace and thus sheds light on whether claims that prisoners of war's rights were violated would have been understood as claims arising out of the prosecution of the war.

international law, it is the belligerent *government's* responsibility to ensure that POW's are treated in accordance with the Conventions' requirements. *See* 1929 Convention, Art. 2 ("Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them."); 1949 Convention, Art. 12 ("the Detaining Power is responsible for the treatment given" POWs). Indeed, the Geneva Convention establishes that the military authorities of the detaining power remain responsible for the treatment of POWs forced to labor for private corporations, including ensuring that they are paid. 1929 Convention, Art. 28 ("The Detaining power shall assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for the account of private persons."); 1949 Geneva Convention, Art. 57.

It is plain, then, that if plaintiffs had brought their claims for nonpayment of POW wages against Japan—alleging violation of the Geneva Convention, which forms part of the "laws of war," *see Yamashita v. Styer*, 327 U.S. 1, 14 (1946); H.R. Rep. No. 698, *reprinted in*, 1996 U.S.C.A.N. 2166—their allegations would, without question, fall within the scope of actions "taken in the course of the prosecution of the war." Indeed, violations of the Geneva Convention's protections can, in certain circumstances, rise to the level of "war crimes." *See* 18 U.S.C. 2441, *Yamashita*, 327 U.S. at 14.

Plaintiffs' claims are, therefore, necessarily waived as against the Japanese companies for which they labored as well. The Treaty's waiver in this respect is coextensive with respect to Japan and its nationals. If claims against Japan relating to the unpaid forced labor of prisoners of war are barred as acts taken in the prosecution of the war, those same claims are also barred when brought against the Japanese nationals for which that work was performed.[11]

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[11] As the above demonstrates it is entirely irrelevant whether the precise work plaintiffs performed had anything to do with Japan's military operations, whether the private companies operated with a profit motive, or whether plaintiffs' suffering was essential to Japan's war effort.

Were there any doubt as to the understanding of the Treaty at the time of its formation, the Statement of Interest filed by the United States, which includes extensive documentation from the historical record, makes very clear that the United States *did* understand that its waiver of claims encompassed the claims of American POWs against Japanese nationals. The Supreme Court has frequently noted that the State Department's interpretation of America's treaty obligations is entitled to "great weight." *See*, *e.g.*, *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 178, 184–85 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); Restatement of the Law (3rd) Foreign Relations, § 326 ("The President has authority to determine the interpretation of an international agreement," and courts "will give great weight to an interpretation made by the Executive Branch"). Although the courts are not bound to follow a proffered interpretation that contradicts the plain meaning of a treaty, see *Chan*, 490 U.S. at 133–35, where the United States' interpretation is consistent with the natural meaning of the treaty language, that interpretation should be conclusive (fn. omitted).

(2) Korean claimant: Taiheiyo Cement Corporation

On February 11, 2002, the United States filed a brief in the Court of Appeals of the State of California, as *amicus curiae* in support of Petitioners in *Taiheiyo Cement Corporation v. Superior Court (Jae Won Jeong, real party in interest)*, No. B155736. In *Taeiheiyo*, plaintiff alleged that he was a Korean national forced by the Japanese government during World War II to perform labor for a Japanese cement manufacturing company in support of Japan's war effort. Plaintiff subsequently moved to the United States, became a U.S. citizen in 1997, and filed a class action suit in Los Angeles County Superior court against the company for which he was forced to work as well as its corporate affiliates. The United States appeared as *amicus curiae* to support defendants' motion to dismiss. The United States explained that California's forced labor statute frustrates the foreign

policy of the United States, established in the 1951 Treaty of Peace, that claims such as plaintiff's are to be resolved through government-to-government arrangements rather than through litigation. The superior court held as a matter of law that the California statute did not interfere with federal foreign policy because the statute did not, in the court's view, target a particular country, and because no foreign government was a party to the litigation. *Ruling re: Defendants' Second Motion for Judgment on the Pleadings*, filed November 29, 2001.

Defendants appealed to the Court of Appeals for the State of California, Second Appellate District. The United States filed a brief as *amicus curiae* in support of petitioners. Excerpts from the brief, set forth below, argue that the Constitution grants the federal government exclusive authority to conduct the nation's foreign relations and that the U.S. Supreme Court has enforced the constitutional design by striking down state laws that would frustrate the objectives of established federal foreign policy or would have an indirect effect on the nation's foreign relations. It also argued that the California statute would violate the prohibition against states engaging in foreign policy, even in the absence of specific federal law on the issue, and that the California law in question also violates constitutional limits on the jurisdictional reach of state law.

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

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ARGUMENT

I. THE CONSTITUTION PRECLUDES CALIFORNIA FROM INTERFERING IN THE FEDERAL GOVERNMENT'S DETERMINATION THAT PLAINTIFF'S CLAIMS SHOULD BE RESOLVED THROUGH GOVERNMENT-TO-GOVERNMENT ARRANGEMENTS.

A. The Constitution Vests Full And Exclusive Responsibility For Foreign Relations In The Federal Government.

1. The Framers understood that the maintenance of peace between the States and with foreign nations required that a single national government be made responsible for both interstate and international affairs. . . .

* * * *

2. From the earliest days of the Republic, the Supreme Court has recognized that the commitment of certain powers to the national government reflects a limitation on the States' authority to regulate the affairs of other States or foreign nations. The grant to the Federal Government of authority to conduct foreign relations, necessarily implies a prohibition on state activity in that arena. "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942). As the Court has made clear, the Federal Government is entrusted "with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941). *See also Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423–25 (1964); *United States v. Belmont*, 301 U.S. 324, 331–32 (1937); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936).

In light of the "imperative[] * * * that federal power in the field affecting foreign relations be left entirely free from local interference," *Hines*, 312 U.S. at 63, the Supreme Court has held that state "regulations must give way if they impair the effective

exercise of the Nation's foreign policy," *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968).

Because the conduct of foreign policy is committed to the Federal Government, and because of the unique concerns raised by state action in that arena, federal preemption of a state law concerning foreign affairs may be more readily inferred than in the domestic context where federal and state governments share regulatory authority. When the States act in an area in which federal interests predominate, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary preemption when Congress legislates in a field which the states have traditionally occupied." *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 507 (1988) (quotation omitted). "Pre-emption of a whole field * * * will be inferred where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, when a State legislates in an area affecting foreign affairs, the courts are "more ready to conclude that a federal Act * * * supersede[s] state regulation." *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942).

Just as the Supreme Court is more willing to infer affirmative preemption when a state statute intrudes into the foreign policy arena, the Court has also made clear that a state law that directly implicates the conduct of foreign policy will be set aside even if there is no affirmative preemption. In *Zschernig* v. *Miller*, the Supreme Court made clear that a state policy that disturbs foreign relations must give way "even in [the] absence of a treaty" or federal statute. 389 U.S. at 441. *See also* Laurence H. Tribe, *American Constitutional Law*, § 4–5 at 656 (3d ed. 2000) ("all state action, whether or not consistent with current foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void as an unconstitutional infringement on an exclusively federal sphere of responsibility").

The California forced labor statute has far more than an "incidental or indirect effect in foreign countries." *Zschernig*, 389 U.S. at 434–35. Rather, the State has deliberately undertaken the formulation of foreign policy in an area subject to international treaty obligations, adopting a strategy that directly impairs the accomplishment of federal policy and prevents the nation from speaking with one voice on a matter of international concern.

Because the policy reflected in California's forced labor statute is in direct tension with the nation's foreign policy expressed in the 1951 Treaty of Peace, the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal policy and is, thus, affirmatively preempted. *Hines*, 312 U.S. at 67; *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 (2000). However, even if the Court were to conclude that the forced labor statute has not been affirmatively preempted, it is plain that the statute in design and effect impermissibly intrudes into the conduct of foreign affairs and is therefore beyond the authority of the State to enact.

B. Federal Law Preempts California's Forced Labor Statute, Which Stands As An Obstacle To Achieving The United States' Foreign Policy Established In The 1951 Treaty Of Peace.

The 1951 Treaty of Peace reflects the President and Senate's considered judgment that *all* claims arising out of Japan and Japanese nationals' conduct in the course of World War II, including claims between private individuals, should be resolved through inter-governmental negotiations. The Allied parties to the Treaty, including the United States, expressly "waive all * * * claims of the Allied Powers *and their nationals* arising out of any actions taken by Japan *and its nationals* in the course of the prosecution of the war." Art. 14(a) (emphasis added). The Treaty of Peace likewise provides that the claims of Korea and China, and those of their nationals, will be resolved through inter-governmental agreements rather than litigation. While the Treaty

may not be directly binding on Korea and China, who were not parties to the Treaty, the Treaty does establish the law of the United States with respect to the war-related claims of Korean and Chinese nationals.

As noted above, the Treaty of Peace both ensured for Korea and China the same benefit as the Allied parties had obtained for themselves and directed that war-related claims of Koreans and Chinese, like those of Allied nationals, would be settled on a government-to-government basis. Japan was required to renounce its interests in Korea and China, and the Korean and Chinese authorities were allowed to seize and liquidate all Japanese assets within their territories—assets worth billions of dollars. *See* Art. 4(b) (Korea); Art. 10, 14(a)(2), 21 (China). In return, both Korea and China were expected to settle, as the Allied parties had, the war-related claims of themselves and their nationals against Japan and its nationals. *See* Art. 4(a) ("claims * * * of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and [Korean] authorities"); Art. 26 (providing that Japan was to enter a peace treaty with China, settling the war "*on the same or substantially the same terms as are provided for in the present Treaty*" (emphasis added)).

California's forced labor statute runs directly contrary to the United States' foreign policy of relegating the war-related claims of Korean and Chinese nationals to inter-governmental resolution. Whereas federal law provides that the claims of Korean and Chinese nationals, like those of Americans themselves, are to be resolved by government-to-government settlements, the California statute grants such claims a preferred status, with uniquely favorable substantive and procedural rules. *See*, *e.g.*, Cal. Code Civ. Pro. § 354.6(a)(3) (affixing damages in a manner to eliminate the effect of post-war inflation), § 354.6(b) (making corporations doing business in California liable for the debts of their Japanese affiliates, without regard to traditional principles of corporate identity), § 354.6(c) (setting aside generally-applicable statutes of limitations in favor of an 81-year limitations period).

The superior court mistakenly believed that the federal Treaty could preempt the California statute with respect to plaintiff's claim only if the Treaty itself actually resolved the Korean and

Chinese claims.[9] Thus, the superior court found it conclusive that the Treaty "did not and could not regulate claims of foreign nationals against the companies that had forced them to work without wages." Sept. 14 Opinion at 14. This misconceives the nature of both the Treaty and federal preemption. It is not necessary for the Treaty to finally resolve plaintiff's claim in order for the federal law to preempt California's attempt to encourage litigation of that claim. It is sufficient that the Treaty establishes, as a matter of United States law, that plaintiff's claim is to be resolved by inter-governmental arrangements, rather than litigation. It is irrelevant, therefore, whether, as a matter of Korean or Japanese law, plaintiff could pursue his claim in the courts of those nations; he may not, according to the United States' policy adopted in the Treaty, pursue his claim in the courts of the United States. The California statute plainly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Treaty. *Hines*, 312 U.S. at 61; *Crosby*, 520 U.S. at 373.

Plaintiff's argument (and that of the superior court) is similar to that advanced by Massachusetts and rejected by the Supreme Court in *Crosby*. There, Congress had adopted a policy, reflected in the Federal Burma Act, of giving the President flexibility in using economic sanctions to promote improved human rights conditions in Burma. 530 U.S. at 374–75. Massachusetts contended that the President's flexibility was limited to the specific matters stated in the statute. Thus, Massachusetts argued that while the President had flexibility over *federal* sanctions, Congress had "implicitly left control over state sanctions to the State." *Id.* at 376 n.10. The Supreme Court rejected this "cramped view" of the federal law's preemptive scope. *Ibid.* Because the natural effect of the state law was to reduce the President's bargaining authority, the state statute was preempted. *Id.* at 376–77.

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[9] It should be noted that plaintiff purports to represent a class of individuals who were forced to work for Onoda Cement Company. To the extent that any members of the putative class were nationals of the United States or Allied parties at the time of the Treaty, their claims are directly barred by the waiver in Article 14 of all claims by party nationals against Japanese nationals arising out of Japan's prosecution of the war.

Similarly here, the natural effect of the California forced labor statute, with its uniquely favorable rules, is to encourage litigation of precisely those claims that federal policy declares should be resolved by government-to-government agreement. Because the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the 1951 Treaty of Peace, the statute is preempted. *See Crosby*, 530 U.S. at 377 (quoting *Hines*, 312 U.S. at 67).

C. Even if Not Affirmatively Preempted, the California Forced Labor Statute Is an Unconstitutional Intrusion Into the Conduct of Foreign Affairs.

The Supreme Court has established that, even apart from statutory preemption, the Constitution's commitment to the Federal Government of the exclusive responsibility for conducting the nation's foreign affairs acts as an independent constraint on state activity. Thus, "even in [the] absence of a treaty" or federal statute, a state policy that disturbs foreign relations must be set aside. *Zschernig*, 389 U.S. at 441. *See also Chy Lung* v. *Freeman*, 92 U.S. 275 (1875) (striking down California statute requiring ship to post bond for certain foreign immigrants without finding conflict with any federal statute or treaty). It is not a question of "balanc[ing] the nation's interest in a uniform foreign policy against the particular interests of a particular state"; rather, "there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed." *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 52 (1st Cir. 1999), *aff'd*, 530 U.S. 363 (2000).

Zschernig is illustrative. In that case, the Supreme Court struck down an Oregon probate law that prevented the distribution of estates to foreign heirs if, under foreign law, the proceeds of the estate were subject to confiscation. 389 U.S. at 431. The Court noted that application of the statute required state courts to engage in "minute inquiries concerning the actual administration of foreign law" and to judge the credibility and good faith of foreign counsels, *id.* at 435, with outcomes turning upon "foreign policy attitudes"

regarding the Cold War, *id.* at 437. Accordingly, the Court concluded that the statute had "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. The Court held that this "kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government"—was "forbidden state activity." *Id.* at 436.

The California forced labor statute represents a similar impermissible intrusion into the Federal Government's authority to regulate foreign affairs. California is plainly of the view that Japanese companies' use of unpaid forced labor, even if condoned by the Imperial Japanese government, violated transcendent principles of international human rights law. But under our constitutional scheme, only the Federal Government has the authority to prescribe penalties for foreign violations of international law. *See* U.S. Const. Art. 1, § 8, cl. 10.

This is particularly so where, as here, the international law violations at issue were committed in conjunction with a foreign government during the course of a war against the United States. As the Supreme Court has recognized, war-related claims, including the claims of nationals, are frequently the subject of government-to-government negotiations at the conclusion of hostilities. *See*, *e.g.*, *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) (upholding the Federal Government's power to abolish, by way of treaty, private prize claims against foreign property); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796) (refusing to adjudicate a personal debt, confiscated by Virginia during the Revolutionary War, because the treaty of peace concluding the war had not provided for such claims). The decision whether to risk continued animosity with a foreign power by creating claims in American courts arising out of foreign nationals' participation in their government's atrocities is a determination that only the Federal Government is authorized to make. *See Pink*, 315 U.S. at 225 (noting that "the existence of unpaid claims against Russia *and its nationals* which were held in this country * * * had long been one impediment to resumption of friendly relations between these two great powers" (emphasis added)).

Even a State with the best of intentions lacks the resources and breadth of view necessary to assess the impact of punishing particular international law violations on the United States' multi-faceted international interests. *See*, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381–82 (2000) (observing that independent state activity would undermine President's ability to coordinate the country's multi-pronged policy of encouraging democratic change in Burma through enticements, threats, and cooperation with other foreign nations). A state legislature is in a poor position to assess what risks to our relations with Germany and Japan are entailed by a statute that aims to redress the wrongs of World War II, or to weigh those risks against other foreign policy objectives that depend upon the good will of those governments. Whether for lack of responsibility or inadequate information, States' policies are likely to be motivated by purely local considerations, to the detriment of the nation as a whole. *See* Lori A. Martin, *The Legality of Nuclear Free Zones*, 55 U. Chi. L. Rev. 965, 993 (1988).

In enacting the World War II slave and forced labor statute, the California legislature has interjected itself into the "forbidden" territory of foreign affairs. At the time of the bill's signing, the provision's author made clear that the statute was intended to influence the conduct of the United States and German governments in their discussions relating to Holocaust-era claims:

> [Section 354.6] *sends a very powerful message from California to the U.S. government and the German government*, who are in the midst of rather closed negotiations about a settlement. * * * If the international negotiators want to avoid very expensive litigation by survivors * * *, they ought to settle. * * * Otherwise, this law allows us to go ahead and take them to court.

See Henry Weinstein, *Bill Signed Bolstering Holocaust-Era Claims*, Los Angeles Times, July 29, 1999, at A3 (1999 WL 2181642) (emphasis added).

Plainly, the California legislature has engaged in a policy-oriented balancing of interests and decided that the benefits of

adopting a law with respect to German and Japanese forced labor claims were worth the risks entailed in antagonizing the target companies and the German and Japanese governments. As to the States, such foreign policy debates are "forbidden * * * activity." *Zschernig*, 389 U.S. at 435–36. Like other state statutes that have been held invalid under *Zschernig*, this statute too unacceptably compromises the nation's interest in having its foreign policy conducted by a national government responsible to the citizens of all states. *See Natsios*, 181 F.3d at 53 (Massachusetts statute restricting the ability of state agencies to purchase goods or services from companies that also did business in Burma was specifically designed to affect the affairs of a foreign country); *Miami Light Project* v. *Miami-Dade County*, 97 F. Supp. 2d 1174, 1176–77, 1180 (S.D. Fla. 2000) (by adopting ordinance that required public contractors to certify that neither they nor their sub-contractors had engaged in commerce with Cuba, Cuban products or Cuban nationals, county had impermissibly inserted itself into a "hotbed of foreign affairs" with the intent to "protest and condemn Cuba's totalitarian regime"); *Tayyari* v. *New Mexico State Univ.*, 495 F. Supp. 1365, 1376–80 (1980) (state university's policy of denying admission to Iranian students in retaliation for the Iranian hostage crisis intruded upon "the arenas of foreign affairs and immigration policy, interrelated matters entrusted exclusively to the federal government"); *Springfield Rare Coin Galleries, Inc.* v. *Johnson*, 503 N.E.2d 300, 302–03 (Ill. 1986) (state law regarding the sale of South African coins was unconstitutional where adopted "as an expression of disapproval of that nation's policies"); *New York Times Co.* v. *City of New York Comm'n on Human Rights*, 361 N.E.2d 963, 968 (N.Y. 1977) (striking down prohibition on advertizing jobs in South Africa as an impermissible intrusion upon foreign relations). *Compare Trojan Technologies, Inc.* v. *Pennsylvania*, 916 F.2d 903, 913–14 (3d Cir. 1990) (upholding state "Buy America" statute in part because the law did not involve evaluation of specific foreign nations), *cert. denied*, 501 U.S. 1212 (1991).

Further, like the Massachusetts Burma statute, the potential foreign policy impact of California's forced labor statute must be assessed within the "broader pattern of state and local intrusion."

Natsios, 181 F.3d at 53. If California is free to redress the wrongs associated with forced labor during World War II, then each State is free to adopt similar—or even inconsistent—laws relating to their preferred foreign human rights issue, whether it be repression in Burma, *cf. Natsios*, 181 F.3d at 53, or communism in Cuba, *cf. Miami Light Project*, 97 F. Supp. 2d at 1180. In addition to violating the territorial limitations on state jurisdiction, discussed below, such a rule would severely undermine American foreign policy. Individual States cannot be permitted to force their favored issues or preferred resolutions into the Federal Government's discussions. *See Crosby*, 530 U.S. at 382–83 (observing that Massachusetts had distracted foreign policy toward Burma by making the state law the focus of diplomacy, rather than Burma's conduct).

As discussed above, the conflict with federal policy in this case is real and direct. The Federal Government made the determination at the conclusion of World War II that the nation's strategic need for a strong, democratic ally against communism in Asia required that claims against Japan and Japanese companies be resolved finally through inter-governmental negotiations. Thus, the Allies, including the United States, foreclosed litigation of their nationals' war-related claims in exchange for the right to confiscate and distribute Japanese assets within their territory. The Allies directed that the claims of Korean and Chinese nationals be dealt with similarly. California's forced labor statute moves in precisely the opposite direction, encouraging and facilitating litigation of the exact claims that the federal policy seeks to bar.

The superior court's opinions in this case exemplify the extent to which the California forced labor statute has drawn the State's courts into matters of foreign affairs, in the same way as that condemned by the Supreme Court in *Zschernig*. Based upon the inaccurate premise that the United States had not opposed California's attempt to meddle in Holocaust-era claims arising from the European Theatre,[10] the superior court criticized the United

[10] Specifically, the superior court criticized the United States for not filing a brief in opposition to California's interference in foreign policy by way of the Holocaust Victims Insurance Relief Act ("HVIRA"). *See* Nov. 29 Opinion at 10. A review of the Ninth Circuit's opinion in *Gerling Global*

States' purportedly "uneven" and "disparate" treatment of Japan and Germany and deemed federal foreign policy to be "legally unsupportable." Nov. 29 Opinion at 11. *See also* Ruling re: Defendants' Motion for Judgment on the Pleadings, filed September 14, 2001 ("Sept. 14 Opinion"), 18 (holding that adjudication of plaintiff's claim "would not interfere with any *legitimate* United States governmental foreign policy interest" (emphasis in original)). Plainly, it is beyond the superior court's authority to determine whether the United States government has a "legitimate" basis for treating one foreign government different from another.

Actual adjudication of plaintiff's claims would draw the state courts even deeper into the terrain of foreign affairs. The court would be called upon to adjudicate whether Japan's bilateral treaties with South Korea and the Republic of China do, in fact, resolve the legal claims of plaintiff and other members of the putative class. If the parties to those agreements disagree on their meaning, a court ruling either way might well inflame simmering international disputes. Moreover, a finding that the treaties had not finally resolved those claims would be the equivalent to a determination that Japan had violated its obligations under the terms of the 1951 Treaty of Peace. An individual state legislature cannot interject its courts into such foreign policy thickets. *See Zschernig*, 389 U.S. at 435–37.

* * * *

Reinsurance Corp. of America v. *Low*, 240 F.3d 739, 741 (9th Cir. 2001), reveals that the United States did file a brief as amicus curiae in support of plaintiff's constitutional challenge to the HVIRA. Moreover, the United States has filed several Statements of Interest urging courts to dismiss on any valid legal basis Holocaust-era claims against German companies. These Statements were filed consistent with President Clinton's determination, in the context of the Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation "Remembrance, Responsibility and the Future," that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy" for Nazi-era claims against German companies. Foundation Agreement, Annex B, ¶ 1. (The Foundation Agreement can be found at: www.state.gov/www/regions/eur/holocaust/germanfound.html.)

II. THE CALIFORNIA WORLD WAR II FORCED LABOR STATUTE IS EXTRATERRITORIAL LEGISLATION THAT IS BEYOND THE AUTHORITY OF THE STATE TO ENACT.

In addition to Section 354.6's impermissible interference with federal foreign policy, the state statute also violates the federal Constitution's prohibition on States attempting to project their legislative jurisdiction beyond their borders.

A. The Commerce Clause of the federal Constitution "has long been understood" not only as an affirmative grant of authority to the Federal Government, but as a constraint upon the power of the States, which " 'provide[s] protection from state legislation inimical to the national commerce [even] where Congress has not acted.' " *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298, 310 (1994) (quoting *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945)).

As the Supreme Court has explained, the Commerce Clause precludes a State from applying its law "to commerce that takes place wholly outside of the State's borders." *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion). *See also BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 572 (1996) (State may not "impose economic sanctions on violators of its laws with the intent of changing the [violator's] lawful conduct in other States"). Extraterritorial regulation "exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy* v. *Beer Institute*, 491 U.S. 324, 336 (1989).

These principles apply with particular force in the international arena, and the Supreme Court has recognized that the dormant Foreign Commerce Clause prevents States from regulating commerce in a manner that "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.' " *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 451 (1979) (quoting *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976)). A state statute "will violate the 'one voice' standard if it *either* implicates foreign policy issues

which must be left to the Federal Government *or* violates a clear federal directive." *Container Corp.* v. *Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

Similar principles, inherent in the constitutional requirement of due process, also limit a State's ability to project its law beyond its borders. *See Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 310–11 (1981) (plurality) ("if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional"); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818 (1985); *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 407–08 (1930); *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954). *See also Quill Corp.* v. *North Dakota*, 504 U.S. 298, 306 (1992) ("[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax' " (citation omitted)). The due process limitations on a State's extraterritorial legislation look "not only at whether the *parties* * * * have contacts with [the State], but also and more importantly * * * at whether the *subject* [of the legislation] has a sufficient nexus to [the State]." *Gerling Global Reinsurance Corp. of America* v. *Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001) ("*Gerling-Gallagher*").

Applying these principles, the Eleventh Circuit in *Gerling-Gallagher* recently enjoined application of a Florida statute that attempted to force European insurance companies and their Florida affiliates to pay on insurance policies issued in Europe prior to and during World War II. *See Gerling-Gallagher*, 267 F.3d at 1238. The court explained it was insufficient that, subsequent to the Holocaust, some victims had moved to Florida or that affiliates of the European insurers did business in Florida. *Ibid.* The State lacked a sufficient nexus to "the *subject*" of the legislation—"the German affiliates' payment or non-payment of Holocaust-era policy claims." *Ibid.*

B. In enacting its Second World War forced labor statute, the California legislature sought to create and define a cause of action to provide compensation for victims of German and Japanese forced labor practices during World War II. Section 354.6 establishes the cause of action, Cal. Civ. Pro. § 354.6(b), defines

the class of plaintiffs who may sue, *id.* § 354.6(a)(1), (2), affixes the measure of damages (eliminating the effect of post-war inflation), *id.* § 354.6(a)(3), makes corporations doing business in California liable for the debts of their Asian and European affiliates, without regard to traditional principles of corporate identity, *id.* § 354.6(b), and sets aside generally-applicable statutes of limitations, substituting an 81-year statute of limitations that extends to 2010, *id.* § 354.6(c).

Contrary to plaintiff's and the superior court's suggestion, the statute thus is considerably more than a state "statute of limitations." *See* Nov. 29 Opinion at 6, 13. In fact, the paragraph that establishes the limitations period expressly disavows any general application to causes of action that arise independently under other provisions of substantive law. To the contrary, the limitations provision applies only to "[a]ny action *brought under this section*." *Id.* § 354.6(c) (emphasis added).

Whether the substantive law that the forced labor statute establishes is characterized as "California" law or "international" human rights law, the result is the same: California has sought to define liability for events occurring between foreign nationals in foreign nations.

The principles outlined above plainly preclude this extraterritorial legislation. As noted, both the "dormant" Commerce Clause and the Due Process Clause prohibit a State from projecting its laws into other jurisdictions. *See Healy* v. *Beer Institute*, 491 U.S. 324, 336 (1989) (Commerce Clause); *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 407–08 (1930) (Due Process Clause). The California legislature can no more regulate conduct that takes place in Japan or Korea or legislate what damages should be paid for such conduct, than it can impose its regulatory policies on New York.[13]

Section 354.6 applies to conduct in territory "conquered by the Nazi regime, its allies or sympathizers" at any time during

[13] Thus, the superior court was simply wrong when it stated that, in the absence of a clear indication whether Korean or Japanese law would permit plaintiff's claim, the court was free to "apply California law" instead. *See* Sept. 14 Opinion at 12.

World War II. *See* Cal. Civ. Pro. § 354.6(a)(2). By definition, therefore, the statute applies only to conduct that occurred outside of California. Nor does the statute represent an attempt to afford protection to California citizens victimized in foreign nations. The statute seeks to provide relief to persons "taken from a concentration camp or ghetto" in Europe, or "member[s] of the civilian population[s] conquered by the Nazi regime, its allies or sympathizers." *Id.* § 354.6(a). Indeed, with respect to claims against Japanese corporations, the *only conceivable* plaintiffs are individuals who were not nationals of the United States in 1951, when the United States explicitly waived all such claims.

Plaintiff's claims exemplify the statute's extraterritorial reach. Mr. Jeong was a Korean national living in Japan and Korea during World War II, when he was forced by Japanese "government authorities" to perform unpaid-labor "in Korea" for a Japanese company, Onoda Cement Co., Ltd. *See* Sept. 14 Opinion, 2. The connection between the tragic events at issue and California are not apparent. Mr. Jeong later moved to California and Onoda (or at least certain affiliates) presently does business in the State. It is well-established, however, that the mere presence of the parties in a State are not an adequate basis for that State to apply its substantive law to activity with no other significant contact with the State. *Allstate Ins. Co.*, 449 U.S. at 310–11 (citing *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U.S. 178 (1936)).[14]

* * * *

b. Legislation to create federal cause of action

In March 2001 a bill was introduced in the U.S. House of Representatives to create a cause of action under U.S. federal law for U.S. prisoners of war held by Japan during World War II. H.R. 1198, "Justice for United States Prisoners of War

[14] Notably, the Ninth Circuit in *Gerling-Low*, specifically declined to address the insurance companies' "due process" challenge to California's disclosure requirements for Holocaust-era insurance policies. 240 F.3d at 754 n.11.

Act of 2001," 107th Cong. (2001), would require a U.S. federal court not to construe section 14(b) of the Treaty of Peace with Japan as constituting a waiver by the United States of claims brought against a Japanese national by a member of the U.S. armed forces seeking compensation for mistreatment or failure to pay wages in connection with labor performed in Japan for such national as a prisoner of war during World War II. The bill would declare that it is U.S. policy to ensure that any war claims settlement terms between Japan and any other country that are more beneficial than those terms extended to the United States under the Treaty of Peace are extended to the United States in accordance with article 26 of the treaty with respect to claims covered under the Act. In addition, the applicable statute of limitations would be that of the state of the United States in which the action was pending. As used in the bill, the term "Japanese nationals" would include entities organized or incorporated under Japanese law or affiliates of such entities organized or incorporated under the laws of any state of the United States.

In hearings before the House Committee of the Judiciary, Subcommittee on Immigration and Claims, September 25, 2002, William H. Taft, IV, Legal Adviser for the Department of State, testified as to the views of the Department of State on the bill. At the end of 2002 no further action had been taken by Congress.

The full text of the Mr. Taft's testimony, excerpted below, is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

. . . [T]he Department supports justice for U.S. prisoners of war, but it does not support H.R. 1198 and would oppose its enactment.

By "justice for U.S. prisoners of war," we mean that the United States should assure that our POWs, together with all our veterans, should receive full and fair compensation for their service. Special hardships connected with that service, such as those suffered by POWs, should be considered in determining what compensation

is proper. Obviously, no amount of money can fully compensate those who, as POWs, have survived years of ill treatment in unspeakable conditions; those who have become permanently disabled in the service of our country; or, much more, those who have given their lives in that service. Nonetheless, we owe it to those who serve to do our best to establish an equitable system that takes into account the many different situations they experience. It is an obligation the United States has to its servicemen—all of them. It should not depend for its fulfillment on such unpredictable and variable factors as whether some person or corporation responsible for a particular injury is liable to suit, has the ability to pay, or decides as a matter of discretion to be generous.

In the aftermath of World War II, the government had to determine how to compensate those who had served in that conflict. There was naturally special concern for those who had been POWs in the Pacific Theater, and special provision was made for their compensation. This was done with full consideration of the circumstances of others who had served. A War Claims Fund was established to finance this effort. [See, e.g., *Hearings before the Committee on Foreign Relations of the United States Senate on Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific*, pp. 145–147 (January 21–23, and 24, 1952); War Claims Act of 1948, *as amended*, 50 U.S.C. App. § 2001, et seq.; 1951 Peace Treaty, Article 16, 3 U.S.T. 3185.]

The Peace Treaty with Japan was negotiated, signed and ratified against this background. It provided, among other things, that certain assets of the Japanese Government and Japanese nationals would be confiscated and used to compensate U.S. citizens and servicemen for claims against Japan. [Treaty, Article 14.] The U.S. used some of these assets to make payments to POWs specifically and some for other purposes. [War Claims Act of 1948, *as amended*, supra.] The Treaty expressly waived all claims of U.S. nationals "arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war . . ." [Treaty, Article 14(b).] This waiver applies to claims by POWs as well as others.

In giving its advice and consent to the Treaty, the Senate considered the extent of the claims it was waiving and the money

available to satisfy them in the War Claims Fund. In addition to Japanese assets confiscated by the U.S., there was a chance that assets confiscated by other Allied governments would be available. Beyond that, however, the Senate was informed in response to its inquiry that, "U.S. nationals . . . must look for relief to the Congress of the United States." The Senate Foreign Relations Committee advised the Senate accordingly in reporting the Treaty, noting that it was "the duty and responsibility of each [Allied] government to provide compensation for persons under its protection as that government deems fair and equitable, such compensation to be paid out of reparations that may be received from Japan *or from other sources*." [hearings, supra, at 147; emphasis added.]

So, the Treaty waived the claims against Japanese nationals that H.R. 1198 seeks to revive. Moreover, in approving the Treaty the United States clearly understood that any additional compensation for POWs or other U.S. claimants was its own responsibility. Former Secretary Shultz, in the letter he wrote in June last year to the Chairman and Members of this Committee, expressed the same view: "Where we have veterans," he said, "especially veterans of combat who are not being adequately supported, we must step up to their problems without hesitation." I am sure all Americans would agree.

"But," Secretary Shultz continued, "let us not unravel confidence in the commitment of the United States to a treaty properly negotiated and solemnly ratified with the advice and consent of the U.S. Senate." Because that is what H.R. 1198 would do, we cannot support it.

I would like to mention briefly three reasons why the Administration opposes its enactment.

First, H.R. 1198's revival of World War II claims against Japanese nationals that were waived in the 1951 Peace Treaty would be inconsistent with our Treaty commitments, as clearly understood by our negotiators and by the United States Senate when it gave its overwhelming advice and consent to ratification.

Second, walking away from our commitments under the 1951 Peace Treaty would have adverse foreign policy consequences. The Treaty has for 50 years been the cornerstone of U.S. security policy in the Pacific region. Abandoning it now could have serious

repercussions for our defense relationship with Japan and other countries in the region, apart from generally damaging U.S.-Japan relations.

Third, H.R. 1198 raises constitutional concerns. The bill raises separation of powers concerns, since Congress would assume the constitutional prerogative of the Judicial and Executive branches to determine what treaties of the United States mean. This problem is evident in the bill's central provision—its mandate of a specific judicial construction of Article 14(b) of the Treaty, one that is inconsistent with prior Judicial and Executive branch constructions of the provision.

Many of the findings recited in section 2 of the bill are likewise inconsistent with the conclusions reached by the Judicial and Executive branches.

In conclusion, the Administration is of the view that H.R. 1198 is—on both legal and policy grounds—the wrong way for the United States to go. If we determine that additional assistance is necessary to the well-being of our World War II POWs from the Pacific Theatre—or any other group of veterans, for that matter—the way to provide such relief consistent with the Treaty would be for the Congress to appropriate funds for that purpose.

* * * *

c. Applicability of statute of limitations in suit against the United States for Fifth Amendment taking

In *Hair v. U.S.*, 52 Fed. Cl. 279 (Fed.Cl. 2002), the U.S. Court of Federal Claims dismissed a suit filed by a purported class of U.S. citizens "injured or killed as a result of Japan's criminal war of aggression from December 7, 1941 until September 2, 1945." Claimants alleged that the United States was liable to them for a taking without just compensation under the Fifth Amendment, in connection with the 1952 ratification of the 1951 Treaty of Peace. The court noted that such claimants acknowledged that the United States had "purported to waive" such claims in the Treaty of Peace and that Congress

had established a commission to compensate U.S. citizens who were prisoners of war or internees during World War II under the War claims Act, 50 app. U.S.C. §§ 2001–2017p. The court dismissed the case, however, on the basis of the six-year statute of limitations applicable to all claims before the Court of Federal Claims, noting that this statute of limitations "must be strictly construed, as it pertains to the government's waiver of sovereign immunity."

5. Other Claims Against the United States: Kenyan Claims from Embassy Bombing

On July 30, 2002, the U.S. District Court for the District of Columbia dismissed actions brought by a prospective class of Kenyan citizens and businesses in connection with the August 7, 1998 terrorist bombing of the U.S. Embassy in Nairobi, Kenya. *Macharia v. U.S.*, 238 F. Supp. 2d 13 (D.D.C. 2002). Among the grounds on which the claims had been brought was the allegation that the United States violated "'elemental principles of international law,' the constitution of Kenya, and customary international law through the International Covenant on Civil and Political Rights ('ICCPR')." *See Digest 2001* at 417–421. In finding that it lacked subject matter jurisdiction over claims brought under the Kenyan constitution or other laws of Kenya, the court found that the "foreign country exception" was specifically added to the Federal Tort Claims Act "to prevent plaintiffs from subjecting the Untied States to suits brought pursuant to foreign laws." As to the ICCPR, the court concluded:

> [I]in order for the United States to be subject to suit, there must be an express waiver of sovereign immunity. There is no such waiver related to claims brought pursuant to the ICCPR. When the Senate ratified the ICCPR it did so with a declaration that articles 1 to 27 were not self-executing. 138 Cong. Rec. S4,784 (daily ed. Apr. 2, 1992). A treaty that is not self-executing requires further action by Congress to incorporate it into domestic

> law and without such action courts may not enforce such a treaty. . . . Courts have uniformly held that the ICCPR is not self-executing and that, therefore, it does not give rise to a private right of action. . . . Accordingly, Plaintiffs claim based on the ICCPR must be dismissed for failure to state a claim and for lack of jurisdiction.

The court also found that plaintiffs had failed to allege "even the basic elements of a violation of . . . international customs."

Cross Reference

Claims under Alien Tort Statute and Torture Victims Protection Act, **Chapter 6.G.3.**

Sovereign and head of state immunity in claims against foreign countries and officials, **Chapter 10.A., B.**

Chapter 9

Diplomatic Relations, Succession and Continuity of States

A. AFGHANISTAN

On January 18, 2002, the U.S. Liaison Office in Kabul was closed and the U.S. Embassy in Afghanistan resumed operations. Robert Finn was sworn in as U.S. ambassador to Afghanistan on March 22, 2002.

B. EAST TIMOR

The United States established full diplomatic relations with the Democratic Republic of East Timor and opened an embassy in Dili on May 20, 2002, the day that East Timor gained independence. The United States had opened a U.S. Representative Office ("USRO") in Dili on February 15, 2002. The official press statement is set forth below, available at *http://usembassy-australia.state.gov/hyper/2002/0520/epf109.htm*.

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The Department of State is pleased to announce that the United States has established full diplomatic relations with the Democratic Republic of East Timor and has opened an embassy in the capital, Dili, effective May 20, 2002. The Embassy will be headed by a Chargé d'Affaires until such time as the President nominates and

the Senate confirms an ambassador. The current Charge is Shari Villarosa.

The United States looks forward to working with the people and the government of the Democratic Republic of East Timor to foster the growth of democracy and prosperity in the first nation of the new millennium.

Cross Reference

Peace Corps agreement in East Timor, **Chapter 4.A.**

Chapter 10

Immunities and Related Issues

A. SOVEREIGN IMMUNITY

Under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–1611, a state and its instrumentalities are immune from the jurisdiction of U.S. courts unless one of the specified exemptions in the statute applies. 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 in 1976, 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, 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 (1976). The test for making this distinction is the nature of the transaction in question (the outward form 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' ").

From the beginning the FSIA has provided certain other exceptions to immunity, such as by waiver or agreement to arbitrate. Over time, amendments to the FSIA have incorporated additional exceptions. One of the most invoked in recent years has been the "terrorism" exception enacted in 1996. The various statutory exceptions set forth at §§ 1605(a)(1) to (7) have been subject to judicial interpretations.

Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the government is not a party and does not participate. The following items represent only a selection of the relevant decisional material.

1. Scope of Application

a. Definition of foreign state

In *Boshnjaku v. Federal Republic of Yugoslavia*, 2002 U.S. Dist. LEXIS 13763 (N.D. Ill. 2002), Albanian residents and former residents of the town of Gjakove, Kosovo, brought suit against the Federal Republic of Yugoslavia, the Yugoslavian Armed Forces, the Republic of Serbia, the Serbian Armed Forces, and Slobodan Milosevic, Yugoslavia's former head of state, for damages resulting from the policy of "ethnic cleansing" of ethnic Albanians. The district court denied plaintiffs'

motion for a default judgment and summary judgment, holding that the Yugoslavian and Serbian governments and their armed forces were "foreign states" as that term is defined in the FSIA. Even assuming that former President Milosevic had been properly served with process, the court said, he qualified as an "agency or instrumentality of a foreign state" entitled to immunity under the FSIA, because he was being sued for actions taken in his capacity as a head of state (citing § 1603(b)(1) and *Chuidian v. Philippine National Bank,* 912 F.2d 1095, 1099–1103 (9th Cir. 1990)). In addition, defendants had not waived their immunity by signing an international agreement (the Agreement on Initializing the General Framework Agreement for Peace in Bosnia and Herzegovina) that did not mention any waiver of immunity to suit (citing *Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989)). Finally, the court said, killings and forced expulsions in the former Yugoslavia did not constitute a commercial activity having an effect in the United States, and alleged violations of customary international law and *jus cogens* did not waive the immunity conferred by the statute. *See also* A.4.a. below.

b. European Police Office

As discussed in Chapter 3.A.1.a.(3), the United States and the European Police Office ("Europol") entered into an agreement in 2002 supplementing a 2001 agreement creating an overall institutional framework for cooperation between U.S. law enforcement authorities and Europol. The supplemental agreement provided for the exchange of personal data and related information. A letter from Linda Jacobson, Assistant Legal Adviser, Law Enforcement and Intelligence, U.S. Department of State, dated November 26, 2002, to Mr. Juergen Storbeck, Director of Europol, responded to an inquiry concerning the extent to which Europol could be held liable for damages in U.S. Courts based on its transmission of information to the United States under the supplemental agreement.

* * * *

I understand that as part of its process of review and approval of the Supplemental Agreement between the United States of America and Europol, the European Union has inquired regarding the extent to which Europol could be held liable for damages in U.S. courts based on its transmission of information to the U.S. under that Agreement. The U.S. legal framework relevant to this inquiry is set forth in the Foreign Sovereign Immunities Act ("FSIA"), Title 28, United States Code, Section 1602 et. seq.

There is an important preliminary point regarding the operation of the FSIA. A key objective in enacting the FSIA was to remove decisions over sovereign immunity from the Executive Branch and to place these decisions in the hands of the judiciary. Section 1602 (Findings and Declaration of Purpose) states that "determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States." Thus, while we are happy to discuss in general how our courts have addressed several issues which could be relevant to coverage of Europol under the FSIA, you should be aware that the courts are legally authorized to make these determinations and only they could make a binding decision regarding Europol.

That being said, with respect to potential liability of a foreign state in a suit brought in a U.S. court, the FSIA provides a presumption of immunity for a foreign state from the jurisdiction of U.S. courts, 28 U.S.C. 1604, unless the conduct forming the basis of the suit falls within a specific exception set forth in that statute, 28 USC 1605–1607.

A threshold question is whether the FSIA protections apply to an organization like Europol, which was established by treaty between a group of foreign governments rather than by a single foreign government. In a similar factual scenario, a U.S. court held that another European treaty-based organization, whose officials perform functions typically performed by national governmental agencies, qualified as a "foreign state" under the terms of the statute. *See In re EAL Corp. v. European Organization for the*

Safety of Air Navigation, 1994 Lexis U.S. Dist. 20528 (D. Del. 1994). See also Gardiner Stone Hunter International v. Iberia Lineas Aereas de Espana, 896 F. Supp. 125, 131 (S.D.N.Y. 1995) (fn 6 and cases cited therein). The activities that Europol would engage in under the agreement—exchange of law enforcement information with the U.S.—are the type of governmental activity for which the FSIA provides protection. *See e.g.*, *Herbage v. Meese*, 747 F. Supp. 60, 66–67 (D.D.C. 1990).

Another issue is whether immunity also extends to Europol officials carrying out duties under the Supplemental Agreement. Some U.S. courts have held that individuals acting as agents of the foreign sovereign in carrying out such governmental activities enjoy the same immunity as the sovereign itself. *Id.* at 66. Of course, the Europol liaison agents accredited to the United States already enjoy immunities in this country based upon their status as members of the EC Mission to the United States.

While Section 1605(a)(5) does provide an exception to foreign sovereign immunity for torts occurring in the United States, this exception would not appear applicable to the transmissions of information from Europol to U.S. law enforcement contemplated under the agreement. In *Argentine Republic v. Amerada-Hess*, 488 U.S. 228 (1988), the United States Supreme Court construed Section 1605(a)(5) to apply only where a tort has been committed within the territory of the United States, not where it was committed outside the U.S. even if it caused effects within the U.S. A reading of the FSIA reveals no other exception to immunity that would appear applicable to Europol activities under the Supplemental Agreement.

* * * *

2. Suits Against Government Officials

a. Doe v. Liu Qi; Plaintiff A v. Xia Deren

By letter dated May 3, 2002, United States Magistrate Judge Edward M. Chen of the Northern District of California requested the Department of State's views on issues related

to *Doe v. Liu Qi* and *Plaintiff A. v. Xia Deren*, C 02-0672 and C 02-0695 respectively. The complaint in this case alleged that Liu Qi, then Mayor of Beijing, was responsible for atrocities committed against adherents of the Falun Gong movement. On September 25, the Legal Adviser of the Department of State, William H. Taft, IV, responded by writing to Assistant Attorney General Robert D. McCallum asking him to submit the Department's views to Magistrate Chen. That letter was submitted to the court in a Statement of Interest on September 27, 2002.

Excerpts from Mr. Taft's letter setting forth the views of the Department of State on application of the Foreign Sovereign Immunities Act to the claims asserted in *Liu* and *Xi*, are set forth below.

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

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In *Liu*, the gravamen of plaintiffs' complaint is that the defendant, as Mayor of Beijing, People's Republic of China ("PRC"), either knew or should have known about various human rights abuses that were allegedly perpetrated against adherents to the Falun Gong movement in Beijing, and that he was under a duty under both Chinese and international law to prevent such actions.[1] The complaint alleges that Defendant Liu "planned, instigated, ordered, authorized, or incited police and other [PRC] security forces to commit the abuses suffered by Plaintiffs, and had command or superior responsibility over, controlled, or aided and abetted such forces in their commission of such abuses. The acts alleged herein . . . were carried out in the context of a nationwide crackdown against Falun Gong practitioners." Compl., ¶ 2.

In *Liu*, all but one of the plaintiffs are aliens; four apparently reside in the United States. Federal subject matter jurisdiction is

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[1] We note that the Complaint caption refers to "Liu Qi, and Does 1–5, inclusive," but we have not found specific reference in the complaint to any defendants other than Mr. Liu.

alleged to lie under customary international law, the Torture Victims Protection Act (TVPA), 28 U.S.C. § 1350, note, the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and 28 U.S.C. § 1331. *Id.*, ¶ 3.

As noted in Magistrate Chen's May 3 letter, a default was entered in favor of the plaintiffs on March 12. Plaintiffs subsequently moved for judgment by default. In reviewing that motion, the Court has asked for the Department's views on two questions: (1) whether the case is barred under the Foreign Sovereign Immunities Act ("FSIA"), and (2) whether the Court should find the case "nonjusticiable" under the Act of State doctrine. We address these issues in turn.

Before turning to the questions posed by the Court, we would note Magistrate Chen's subsequent invitation to provide the Department's views in the *Xia* case. From our review of that complaint, we conclude, as did Magistrate Chen in his August 5 order, that the relevant issues involved in both cases are "similar, if not identical." In these circumstances, we see no need to comment separately on the *Xia* case; the views as expressed below regarding *Liu* may be taken to apply *mutatis mutandis* to *Xia*. At the same time, we note that the complaint in *Xia* is unambiguous that the defendant was acting in his official capacity.

We also stress our deep concern about the human rights abuses that have been alleged in these complaints. The United States has repeatedly made these concerns known to the Government of the PRC and has called upon it to respect the rights of all its citizens, including Falun Gong practitioners. Our critical views regarding the PRC Government's abuse and mistreatment of practitioners of the Falun Gong movement are a matter of public record and are clearly set forth in the Department's annual human rights reports, the most recent version of which may be found at *http://www.state.gov/drl/rls/hrrpt/2001/eap/8289.htm*.

With respect to the FSIA, Magistrate Chen asked specifically whether the exception to immunity under 28 U.S.C. § 1605(a)(7) applies to the case against *Liu*. In our considered opinion, the exception under 28 U.S.C. § 1605(a)(7) does not apply by its terms, since the Peoples' Republic of China has never been designated as a state sponsor of terrorism within the meaning of

subsection (A) of that provision. Nor, in our view, does the "tort" exception under 28 U.S.C. § 1605(a)(5) apply since none of the acts in question occurred in the United States. It does not appear to us that any other exception of the FSIA would be relevant to the facts alleged in the complaint. Therefore, if the FSIA is the appropriate legal framework for determining the issue, the action would have to be dismissed. *See* 28 U.S.C. §§ 1330, 1604 (immunity unless there is exception under 28 U.S.C. §§ 1605–1607).

Whether the FSIA applies to this case presents a number of issues for the Court to determine. We understand that, since *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), the practice in the 9th Circuit has been to evaluate claims brought against individual foreign government officials in United States federal courts according to whether the allegations giving rise to the suit were performed in an official capacity. Where the conduct is found to be official, the courts have deemed the action to be, in effect, a claim against the foreign state, and have applied the analytical framework of the FSIA. Other jurisdictions have also adopted this approach. *See*, *e.g.*, *Byrd v. Corporacion Forestal Y Industrial de Olancho S.A.*, 182 F.3d 380, 388–89 (5th Cir. 1999); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996).[2]

The following considerations may be relevant given this framework. As noted above, the only named defendant in *Liu* is Beijing's Mayor, Mr. Liu Qi. The allegations of the complaint are directed solely towards actions he allegedly took, or failed to take, as a senior official of the Chinese Government, in implementation of official policy. What is at issue, in the words of the complaint, is the "Chinese government's crackdown on Falun Gong," and more particularly the "[a]buses being committed by police and security forces in Beijing against the Falun Gong." Compl., ¶¶ 31, 32. The acts and omissions attributed to Mayor Liu are

[2] The Executive Branch has not specifically endorsed the approach of *Chuidian*, but recognizes that it is controlling law in the 9th Circuit in which these cases arise.

characterized as part of this "widespread governmental crackdown"; the duties he is said to have violated derived from his official position. The complaint specifically alleges that "[a]s the Mayor of the City of Beijing, Defendant Liu held and holds the power not only to formulate all important provincial policies and policy decisions, but also to supervise, direct and lead the executive branch of the city government, which includes the operation of the Public Security Bureau of Beijing, under which the police operate, and other security forces." *Id.*, ¶ 34.[3]

It is noteworthy in this regard that the 9th Circuit has previously held that the FSIA is not rendered inapplicable because of alleged violations of customary international law by the officials of a foreign state defendant. *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993). *See also Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989)(FSIA is exclusive basis for suit against foreign state notwithstanding alleged violations of international law by its officials). Because suits against current officials may well constitute the "practical equivalent" of suits against the sovereign, and because denial of immunity in such circumstances would allow "litigants to accomplish indirectly what the [FSIA] barred them from doing directly," *Chuidian*, *supra* at 1101–02, we believe the courts should be especially careful before concluding that the FSIA is inapplicable to a suit against a current official relating to the implementation of government programs. *Cf.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993) ("the intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment and torture of Nelson) . . . boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood . . . as peculiarly sovereign in

[3] As is described more fully below, this is one of a series of suits in U.S. courts against Chinese officials for actions allegedly taken against Falun Gong practitioners. This pattern may reinforce the inference from the complaint that, at bottom, this suit is directed at PRC government policies rather than past conduct of a specific official.

nature"). Otherwise, plaintiffs could evade the FSIA altogether by the simple expedient of naming a high level foreign official as a defendant rather than a foreign state.

We acknowledge the expanding body of judicial decisions under the TVPA holding *former* foreign government officials liable for acts of torture and extrajudicial killing despite (or indeed because of) the fact that the defendants abused their governmental positions. See, e.g., *Xuncax v. Gamajo*, 886 F. Supp. 162 (D.Mass. 1995); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); *Cabello Barreuto v. Fernández Larios*, 205 F. Supp. 2d 1325 (N.D.Fla. 2002). The principal aim of the TVPA was to codify the decision of the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), by providing an explicit statutory basis for suits against former officials of foreign governments over whom U.S. courts have obtained personal jurisdiction, for acts of torture and extrajudicial killing committed in an official capacity. The Senate Report on the TVPA states that "[b]ecause all states are officially opposed to torture and extrajudicial killing . . . the FSIA should normally provide no defense to an action taken under the TVPA against a *former* official" (emphasis supplied).

At the same time, the TVPA was *not* intended to override otherwise existing immunities from U.S. jurisdiction, as courts have recognized in suits brought under these statutes against *current* or *sitting* foreign governmental officials. See, e.g., *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001). These cases are consistent with relevant international authority, such as the decisions of the International Court of Justice in the *Yerodia* case (*Case Concerning the Arrest Warrant of 11 April 2000—Democratic Republic of the Congo v. Belgium*, Judgment of Feb. 14, 2002), the European Court of Human Rights in *Al-Adsani v. The United Kingdom* (No. 35763/97, Judgment of Nov. 21, 2001), and the French *Cour de Cassation* in the case brought against Ghaddafi arising from the bombing of the French (UTA) DC-10 in 1989 over the Ténéré desert (*arrêt* of Mar. 13, 2001).

In response to Magistrate Chen's second set of questions ("Should the Court find the case nonjusticiable under the Act of

State doctrine? What effect will adjudication of this suit have in the foreign policy of the United States?"), we respectfully offer the following observations for the Court's consideration.

Litigation in U.S. courts challenging the legality of a foreign government's actions, or inactions, taken within its own territory, can present sensitive dimensions, as recognized in a number of decisions of the U.S. Supreme Court. *See*, *e.g.*, *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corporation, Int'l*, 493 U.S. 400, 405 (1990)). *Cf.*, *Baker v. Carr*, 362 U.S. 186 (1962). The Court has recognized that the judiciary should approach such litigation with the utmost care and circumspection.

We note that this litigation is only one of several recent cases brought in U.S. federal courts by Falun Gong adherents against high-level PRC officials—typically, under the ATS and the TVPA. The case just added to these proceedings, *Plaintiff A et al. v. Xia Deren*, is but the most recent example. *See also*, *e.g.*, *Peng, et al. v. Zhao*, No. 01 Civil 6535 (DLC) (SDNY) (default judgment in nominal amount of $1 entered, December 26, 2001; defendant Zhao Zhifei was said to be the Department Head of the Public Security Bureau of Hubei Province); *Jin, et al. v. Ministry of State Security*, et al., No. 02-CV-627 (DDC)(case pending); *Petit, et al. v. Ding*, No. CV 02-00295 (D. HI)(case pending) (defendant Ding Guangen is said to be the Deputy Chief, Falun Gong Control Office, and Minister for Media and Propaganda, Central Committee of the Chinese Communist Party of the PRC). In our judgment, adjudication of these multiple lawsuits, including the cases before Magistrate Chen, is not the best way for the United States to advance the cause of human rights in China.

The United States Government has emphasized many times to the Chinese Government, publicly and privately, our strong opposition to violations of the basic human rights of Falun Gong practitioners in China. We have made clear, on repeated occasions, our absolute and uncompromising abhorrence of human rights violations such as those alleged in the complaint, in particular torture, arbitrary detention, interference with religious freedom, and repression of freedom of opinion and expression. The Executive

Branch has many tools at its disposal to promote adherence to human rights in China, and it will continue to apply those tools within the context of our broader foreign policy interests.

We believe, however, that U.S. *courts* should be cautious when asked to sit in judgment on the acts of foreign officials taken within their own countries pursuant to their government's policy. This is especially true when (as in the instant cases) the defendants continue to occupy governmental positions, none of the operative acts are alleged to have taken place in the United States, personal jurisdiction over the defendants has been obtained only by alleged service of process during an official visit, and the substantive jurisdiction of the court is asserted to rest on generalized allegations of violations of norms of customary international law by virtue of the defendants' governmental positions. Such litigation can serve to detract from, or interfere with, the Executive Branch's conduct of foreign policy.

We ask the Court in particular to take into account the potential for reciprocal treatment of United States officials by foreign courts in efforts to challenge U.S. government policy. In addressing these cases, the Court should bear in mind a potential future suit by individuals (including foreign nationals) in a foreign court against U.S. officials for alleged violations of customary international law in carrying out their official functions under the Constitution, laws and programs of the United States (e.g., with respect to capital punishment, or for complicity in human rights abuses by conducting foreign relations with foreign regimes accused of those abuses). The Court should bear in mind the potential that the U.S.G. will intervene on behalf of its interests in such cases.

If the Court finds that the FSIA is not itself a bar to these suits, such practical considerations, when coupled with the potentially serious adverse foreign policy consequences that such litigation can generate, would in our view argue in favor of finding the suits non-justiciable. However, if the Court were to determine that dismissal is not appropriate, we would respectfully urge the Court to fashion its final orders in a manner that would minimize the potential injury to the foreign relations of the United States.

* * * *

b. Kato v. Ishihara

Kato v. Ishihara, 239 F. Supp. 2d 359 (S.D.N.Y. 2002), involved a claim by a Japanese civil servant employed in the New York office of the Tokyo Metropolitan Government ("TMG") against her employer and Shintaro Ishihara, the governor of Tokyo, seeking damages and declaratory and injunctive relief for alleged sexual harassment and retaliation in violation of Title VII of the federal Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law. Plaintiff alleged that in promoting Japanese products and attending trade shows as part of her duties, she had engaged in commercial activity on behalf of her employers and they thus lacked immunity under the FSIA. The court disagreed and granted defendants' motion to dismiss, finding that both TMG and Ishihara fell within the definition of "agencies and instrumentalities" of a foreign state and were thus immune absent an express waiver of immunity or an applicable statutory exception. With respect to Governor Ishihara, the court said that suits against foreign officials acting in their official capacities are the "practical equivalent of a suit against the sovereign directly" (citing to *Bryks v. Canadian Broad. Corp.*, 906 F. Supp. 204, 210 (S.D.N.Y. 1995) ("[I]mmunity under the FSIA extends also to agents of a foreign state acting in their official capacities.") and *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990)). The court also agreed with defendants' contention that plaintiff's activities were non-commerical because her status as a civil servant was determinative of the issue, and the FSIA provides complete immunity to individuals who are officials of a foreign government when they are sued in their official capacity, relying on *Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations*, 111 F. Supp. 2d 457, 463 (S.D.N.Y.2000), and *Zveiter v. Brazilian Nat'l Superintendency of Merchant Marine*, 833 F. Supp. 1089, 1094 (S.D.N.Y. 1993). Further, the court noted, it is clear from the FSIA's legislative history that Congress considered the employment of diplomatic, civil service, or

military personnel to be governmental and not commercial in nature. "If plaintiff [is] either a civil servant or a diplomatic officer, her employment [is] not commercial in nature and the FSIA's commercial acts exception to sovereign immunity would not bring plaintiff's lawsuit . . . within the jurisdiction of this Court."

c. Park v. Shin

While individual government employees may be considered "foreign states" entitled to sovereign immunity within the meaning of the FSIA when they act in their official capacities as employees of a foreign sovereign, they may not be enitled to immunity when they act as individuals. Thus, in *Park v. Shin*, 313 F.3d 1138 (9th Cir. 2002), the Court of Appeals held that the Deputy Consul General of the Korean Consulate and his wife were not entitled to immunity from employment-related claims by their former employee arising from her tenure as their domestic servant. The court found that the plaintiff had been a personal family employee, paid from family funds, and required only incidentally to perform work benefiting the Consulate. Since he had not been performing consular functions when he hired and supervised the plaintiff as required to claim immunity under the Vienna Convention on Consular Relations, and had not been acting within the scope of his official duties, as required to be considered a "foreign state" entitled to immunity under the FSIA, the Deputy Consul General was not entitled to immunity with respect to her claims. Even if he had been acting within the scope of his official duties, the court said, his servant's action fell within the "commercial activities" exception to the FSIA. The act of hiring a domestic servant is not an inherently public act that only a government could perform.

3. Agencies and Instrumentalities: Tiering and Timing

a. In re Ski Train Fire

A private company that owned and operated a ski resort on Kitzsteinhorn Mountain in Kaprun, Austria, was held not to be entitled to immunity as a "foreign state or political subdivision thereof," even though the Austrian government indirectly owned a majority of its shares. A wrongful death action had been brought against the company by the parents and grandparents of children and grandchildren killed in a ski train accident. *In re Ski Train Fire in Kaprun, Austria, on November 11, 2000*, 198 F. Supp. 2d 420 (S.D.N.Y. 2002). In rejecting the defendant's claim under § 1603(b), the court noted disagreement among the circuits on the proper interpretation of "foreign state" as the term is used in the definition of "agency or instrumentality." Some courts have held that an entity owned by an agency or instrumentality qualifies as an agency or instrumentality because it is owned by a "foreign state," allowing subsidiaries of state-owned corporations to come within the Act's protection by virtue of indirect, or "tiered," ownership by the actual foreign state. Others have read the term "foreign state" as referring only to foreign states themselves (and not their controlled corporations), thus limiting an instrumentality to the first tier of ownership: those entities owned directly by the foreign state itself or by a political subdivision. The court adopted the latter interpretation as stated in the excerpts that follow (citations and notes omitted).

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* * * *

The better interpretation is that the term "foreign state" as used in section 1603(b)(2) does *not* include agencies or instrumentalities but refers solely to foreign states proper. *First*, a circular interpretation of section 1603(b) should be avoided. While section 1603(a) provides that the term foreign state "includes" political subdivisions, agencies and instrumentalities, it does not "equate"

foreign state with agency or instrumentality. It is a subtle distinction, but also the only explanation that can be squared with the remainder of section 1603. Thus, reading section 1603(b) to require ownership by a foreign state proper does not cause it to "flatly contradict" section 1603(a).

Second, the use of "political subdivision thereof" would be superfluous if both political subdivision *and* agency or instrumentality were rolled into the phrase "foreign state or political subdivision thereof" in section 1603(b). The legislative history shows that Congress "seemed exceedingly conscious of the distinction between foreign states, political subdivisions, and agencies or instrumentalities of foreign states or political subdivisions If Congress had intended to permit majority ownership by a state controlled corporation to give rise to another agency or instrumentality, it "could easily have stated that an entity must be owned by a foreign state, a political subdivision, or an agency or instrumentality of a foreign state or political subdivision." It did not.

Third, Congress intended to immunize a finite class of foreign governments and their majority-owned businesses because of the affront entailed in hauling a foreign government into court or draining its resources directly by awarding large damages to private litigants. Congress could have, but did not, immunize *every* foreign corporation that is partially state-owned. If the term "foreign state," as used to define agencies or instrumentalities, were to include agencies and instrumentalities, the definition would bring within it a succession of subsidiaries where state control is many times removed and therefore remote at best.

* * * *

b. Dole Food Company v. Patrickson

In 2002 the United States Government filed an *amicus* brief before the U.S. Supreme Court on petition for a writ of certiorari from the decision in *Patrickson v. Dole Food Company, Inc.*, 251 F.3d 795 (9th Cir. 2001), setting forth the government's views on two interpretive issues involving FSIA

§ 1603(b)(2), which provides the statutory definition of an "agency or instrumentality of a foreign state." The first issue presented to the Court was whether § 1603(b)(2) permits indirect ownership or "tiering" through subsidiary corporate layers, or instead limits FSIA coverage to entities whose shares or other ownership rights are held directly by the foreign state or political subdivision. The second issue, concerning "timing," was whether a private corporation qualified as "an agency or instrumentality" if a foreign state had owned a majority of the shares of that corporation at the time of the events giving rise to the litigation but did not own a majority of those shares at the time plaintiff commenced a suit against the corporation.

The suit involved a class action initially brought in state court in Hawaii, under Hawaiian state law, by banana workers from Costa Rica, Ecuador, Guatemala, and Panama against the Dole Food Company, other major fruit companies and chemical companies to recover compensation for injuries allegedly sustained from exposure to a toxic pesticide (dibromocholoropropane or "DBCP"). Defendant Dole Food impleaded two Israeli chemical companies, Dead Sea Bromine Company and Bromine Compounds Limited, which were alleged to have manufactured some of the pesticide at issue. Those companies had previously been owned indirectly by the Israeli government, but had been privatized by the time of suit. They removed the case to federal court pursuant to FSIA § 1441(d). (Dole Foods invoked § 1441(a) to remove based on federal question jurisdiction, 28 U.S.C. § 1331.) Plaintiffs argued that the interest of the Israeli government in the companies was too attenuated to enable them to invoke the provisions of the FSIA. The district court denied plaintiffs' motion to remand, but dismissed the action on grounds of *forum non conveniens*. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the companies were not organs of the Israeli government but indirectly owned commercial operations, which did not qualify as instrumentalities of a foreign state under the FSIA. It also assumed, without so deciding, that the FSIA "does not come

into play where a suit is brought against a private entity that was a foreign state at the time of the alleged wrongdoing, but is no longer." 251 F.2d at 806.

On both of these issues of "tiering" and "timing," the United States urged the Court to affirm the judgment of the court of appeals. (The Supreme Court did so on April 22, 2003 in *Dole Food Company v. Patrickson,* 123 S. Ct. 1655 (2003)). Below are excerpts from the *amicus* brief filed by the United States (footnotes omitted).

The full texts of the submissions of the United States are available at *www.usdoj.gov/osg/briefs/search.html*.

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I. A Foreign State's Ownership Of A Majority Of The Shares Of A Corporate Entity Does Not Confer "Agency Or Instrumentality" Status On The Subsidiaries Of That Entity

A. The Plain Terms Of The FSIA's Majority Ownership Provision Embrace Only Those Entities The Majority Of Whose Shares Or Other Ownership Interest Is Actually Owned By The Foreign State

The "starting point for interpreting a statute is the language of the statute itself." *E.g.*, *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 25 (1989). The key language of the FSIA is contained in Section 1603(b)(2), which confers "agency or instrumentality status" on a corporation "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b)(2). Under the familiar legal concept that a parent corporation and its subsidiaries are separate entities, a foreign state "owns" a majority of the shares of a corporation only if the foreign state itself actually owns those shares.

1. As this Court has recognized, "incorporation's basic purpose is to create a distinct legal entity." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001). Thus, when a foreign state creates a corporation, the law recognizes that the

foreign state and the corporation are, as a matter of law, separate persons. See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 626–627 (1983) ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."). Likewise, when that corporation creates a subsidiary, "the parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all the shares in the subsidiary and the two enterprises have identical directors and officers." Harry Henn & John Alexander, *Laws of Corporations* § 148, at 355 (1983) (Henn & Alexander). See *Burnet* v. *Clark*, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities.").

The foreign state's ownership of the parent corporation's shares may enable it to control that corporation's activities, and the parent corporation's ownership of the subsidiary may enable it to control the subsidiary's activities. See, *e.g.*, *United States* v. *Bestfoods*, 524 U.S. 51, 61–62 (1998) (a "parent corporation" exercises "control through ownership of [the subsidiary] corporation's stock"). The combined effect of such a tiered arrangement may enable the foreign state to exercise effective control over the subsidiary. Nevertheless, the foreign state does not, in the legal sense, *own* the shares of the subsidiary. Rather, it is the parent corporation that owns those shares as one of its corporate assets. See, *e.g.*, 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 31, at 509 (rev. perm. ed. 1999) (*Fletcher*) ("The property of the corporation is its property, and not that of the shareholders, as owners." (footnote omitted)); accord Henn & Alexander § 71, at 128–129 ("Shareholders are neither agents of the corporation * * * nor owners of the corporation's assets.").

* * * *

A foreign state does not, by owning the majority of shares of a corporation, own the assets of that corporation—including that corporation's shares in a subsidiary—because the legal concept of ownership connotes basic rights to use and transfer property that the shareholders of a corporation generally do not possess. See, *e.g.*, *Black's Law Dictionary* 1131 (7th ed. 1999) ("Ownership

implies the right to possess a thing, regardless of any actual or constructive control."). "Shareholders, even the controlling shareholder, cannot * * * assign the corporation's properties and rights, nor apply corporate funds to personal debts or objects, nor release a purchaser's liability to pay the price to the corporation, nor execute a bill of sale covering corporate assets." 1 *Fletcher* § 31, at 515 (footnotes omitted) (collecting cases); see 12B *Fletcher* § 5753, at 62 ("Ordinarily a shareholder cannot convey or mortgage the corporate property or transfer its goodwill or release a debt due to it."). Indeed, shareholders generally no more own corporate assets than they are liable for corporate debts. Cf. 1 *Fletcher* § 43, at 715–716 ("[U]nder ordinary circumstances, a parent corporation will not be liable for the obligations of its subsidiary.") (collecting cases).

3. Congress's understanding that a foreign state's ownership is to be measured by a legal standard, rather than a colloquial one, is confirmed by context. See, *e.g.*, *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) ("[T]he meaning of statutory language, plain or not, depends on context.") (citing *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)). Section 1603(b)(2) does not simply define an "agency or instrumentality" to include companies that a foreign state, in some colloquial sense, "owns." See Dole Br. 16–18 & nn. 5–8. Rather, it defines that term as a corporation "a majority of whose *shares or other ownership interest* is *owned* by a foreign state." 28 U.S.C. 1603(b) (emphasis added). The statute's specific reference to the foreign state's ownership of "shares"—which consist of discrete, legally recognized, units of property—is most naturally understood to signify actual legal ownership of the corporation's stock rather than effective control through a tiered corporate structure.

If Congress had intended to allow the type of tiering that petitioners propose, Section 1603(b) could have easily been written to include within the definition of "agency or instrumentality" those entities "a majority of whose shares" is owned not only "by a foreign state or political subdivision thereof" but also *by another agency or instrumentality of the foreign state*. But Congress did not do so. See H.R. Rep. No. 1487, *supra*, at 15 ("Where ownership is divided between a foreign state and private interests,

the entity will be deemed to be an agency or instrumentality * * * *only if* a majority of the ownership interests (shares of stock or otherwise) is owned by a *foreign state or by a foreign state's political subdivision*." (emphasis added)). Although Congress recognized that the term "political subdivision" should include "all governmental units beneath the central government, including local governments," *ibid.*, it made no similar effort to include all tiered corporate entities beneath the corporation a majority of whose shares the foreign state or political subdivision itself owns.

* * * *

B. Petitioners' Extra-Textual Arguments Are Unpersuasive

Petitioners contend that their construction of Section 1603(b) finds support in (1) the FSIA's goal of protecting foreign relations; (2) the FSIA's legislative history; and (3) the historical treatment of companies indirectly owned by the federal government. Those arguments are without merit.

1. Petitioners contend that their construction advances the FSIA's "primary" purpose of "minimiz[ing] the foreign relations problems that can arise from litigation involving foreign governments and affiliated entities." Dole Br. 12; see *id.* at 23–28; Dead Sea Br. 31–36. Congress made clear in its declaration of purpose, however, that the FSIA seeks to "protect the rights of both foreign states *and* litigants in United States courts." 28 U.S.C. 1602 (emphasis added). The FSIA should be construed with that balance in mind. Congress crafted Section 1603(b) to give proper respect to the competing interests of both foreign states and other litigants in United States courts.

Moreover, Section 1603(b), construed in accordance with the "separate entity" principle, protects the interests of foreign states by granting them a *more generous* measure of protection than foreign states typically grant to foreign-government-owned corporations. By and large, foreign states do *not* grant sovereign-immunity-based protections of any kind to government-owned corporations unless the corporations are engaged in sovereign acts. See Gary Born & David Westin, *International Civil Litigation in United States Courts* 459 & nn. 57–58 (2d ed. 1992).

Section 1603(b) similarly confers "agency or instrumentality" status on corporations engaged in sovereign acts through its provision extending that status to an "organ of a foreign state." 28 U.S.C. 1603(b)(2). *In addition*, Section 1603(b) confers that status—and the accompanying procedural protections—on corporations the majority of whose shares are actually owned by a foreign state, *whether or not* those corporations perform sovereign functions. *Ibid*. Thus, Section 1603(b), even when construed in light of "separate entity" principles, provides broader protection to the sovereign interests of foreign states than other nations ordinarily provide. Consequently, it is unlikely, as so construed, to give rise to "irritations in foreign relations" (Dole Br. 24). Israel, for example, has not joined petitioners in raising objections to the court of appeals' ruling in this case.

Furthermore, Section 1603(b), construed in light of the "separate entity" principle, takes due account of the interests of other litigants. It places a reasonable limit on the extent to which the protections provided by the FSIA may be expanded through the corporate form, and it does so on the basis of clear and manageable rules that rest on familiar corporate law concepts. Individuals who do business with foreign corporations need such rules when determining whether they are dealing with entities that may be subject to the FSIA. Under the United States' understanding of Section 1603(b), the status of a foreign entity can be determined based on whether the entity engages in sovereign activities and on whether a majority of its stock is owned by a foreign state. Under petitioners' construction, the entity's status may be hidden behind a series of corporate shells that place considerable burdens on contracting parties and litigants—as well as the courts—in determining the true legal character of the entity.

This case illustrates the potentially complex inquiries that petitioners' construction would require. See Dole Br. Add. 3a–4a (charts depicting the complicated and constantly changing corporate relationships). Furthermore, if the Court were to adopt petitioners' approach, it would be required to create a rule, without any congressional guidance, for determining *how* to measure whether a foreign state owns a "majority" of the shares of a distantly tiered entity. Petitioners suggest that the Court could

adopt either a "multiplier" rule (see Dole Br. 20, 38) or an "infinite tiering" rule (*id*. at 38 & n. 17). But whether the Court adopted one of those tests, or some other test, it would thrust itself into a policy-making function that does not ordinarily reside in the Judicial Branch. Congress, which regularly fields recommendations for legislative reform, is far better situated to address issues of policy respecting the FSIA. Cf. Working Group of the American Bar Ass'n, *Reforming The Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489 (2002) (proposing legislative amendments, including amendments addressing tiered corporate relationships).

2. Petitioners' claim (Dole Br. 28–29) that the FSIA's legislative history supports their construction is baseless. The only evidence they cite (*id*. at 29) is the House Report's statement that a "mining enterprise" might qualify as an "agency or instrumentality." H.R. Rep. No. 1487, *supra*, at 15–16. Petitioners contend that the word "enterprise" necessarily denotes a multi-corporate undertaking, but plainly that is not so. See, *e.g. Webster's Third New International Dictionary* 757 (1993) (defining "enterprise" as, among other things, "a unit of economic organization or activity (as a factory, a farm, a mine); *esp*.: a business organization: FIRM, COMPANY"). The FSIA's legislative history does not discuss tiered corporate relationships. The legislative history does, however, recognize the significance and vitality of the separate entity principle. See note 2, *supra*.

3. Petitioners are wrong in suggesting that the FSIA's use of the term "owned" implicitly grants "companies indirectly owned by foreign governments the same agency-or-instrumentality status that companies indirectly owned by the federal government enjoy." Dole Br. 31. Congress did not manifest any intent to grant agencies or instrumentalities of foreign states a status equal to corporations owned by the United States. Rather, Congress made clear that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. 1602. See *Verlinden*, 461 U.S. at 486–489.

The FSIA, which "largely codifies the so-called restrictive theory of foreign sovereign immunity," *Weltover*, 504 U.S. at 612–613

(internal quotation marks omitted), implicates different policies than domestic sovereign immunity, and the criteria governing jurisdiction and immunity in each instance are correspondingly different. See *Verlinden*, 461 U.S. at 486 ("[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution."). Compare, *e.g.*, 28 U.S.C. 1605 (FSIA exceptions to immunity), with 28 U.S.C. 2674, 2680 (Federal Tort Claims Act exceptions to immunity); see also 28 U.S.C. 1606 (allowing punitive damages against an agency or instrumentality of a foreign state). Hence, no concrete insights into the nature of the entities covered by the FSIA can be gained by comparing the scope of foreign sovereign immunity to immunities granted in the domestic context.

* * * *

II. The FSIA Does Not Apply To A Foreign Corporation If The Foreign State Does Not Own A Majority Of The Corporation's Shares At The Time Of The Lawsuit

A. The Plain Terms Of The FSIA Grant Protection To Those Entities That Satisfy The FSIA's Definitional Requirements At The Time Of Suit

Even if the Dead Sea Companies could be considered agencies or instrumentalities of Israel at the time that the alleged liability arose, they were not so in 1997, when respondents filed their suit, because Israel had sold its controlling interest in their corporate parents. Because the Dead Sea Companies were no longer "foreign states" under any conception of the FSIA's majority ownership requirement, they were not entitled to invoke the provision of the federal removal statute applicable to a "foreign state," 28 U.S.C. 1441(d).

1. The FSIA prescribes the extent to which a "foreign state," including an "agency or instrumentality," shall be subject to "the jurisdiction of the courts of the United States and of the States." 28 U.S.C. 1604; see 28 U.S.C. 1330, 1441(d), 1605–1607. Because the FSIA is a jurisdictional statute, a corporation that seeks to invoke its provisions must establish that it qualifies as an "agency

or instrumentality" at the time the action is filed. See *Freeport-McMoRaN Inc.* v. *K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam); see *Smith* v. *Sperling*, 354 U.S. 91, 93 n.1 (1957); *Anderson* v. *Watt*, 138 U.S. 694, 702–703 (1891). As Chief Justice Marshall explained nearly two centuries ago:

> It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events.

Mollan v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824); accord *Conolly* v. *Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829).

Congress drafted the FSIA's definitional provisions against the backdrop of that hornbook principle governing jurisdictional statutes. It unambiguously defined an "agency or instrumentality" to include a corporation "a majority of whose shares or other ownership interest *is* owned by a foreign state." 28 U.S.C. 1603(b)(2) (emphasis added). That definition clearly expresses the understanding that an entity qualifies as an "agency or instrumentality" based on the foreign state's current ownership of its shares and that the entity's status as an "agency or instrumentality" may be lost through the foreign state's divestiture of its ownership interest. The FSIA's express direction that an entity qualifies as an "agency or instrumentality" only if a majority of its shares currently "is owned" by a foreign state must be understood to require majority ownership at the time that is relevant for purposes of applying the particular provisions of the FSIA at issue—in this instance, the provisions governing the filing of suits in (or removal of suits to) federal district court.

2. The FSIA's requirement that majority ownership must be demonstrated at the time of suit is no different in principle than the requirement that diversity of citizenship, or other jurisdictional requirements pertaining to the character of the lawsuit, must be demonstrated at that time. See, *e.g.*, 28 U.S.C. 1332. The fundamental question in each case is one of subject matter jurisdiction—whether the dispute is an appropriate one for a federal court to decide. Congress has quite sensibly determined that the

scope of the federal court's subject matter jurisdiction over foreign states, including their agencies and instrumentalities, should depend on the status of the parties at the time of suit. Congress had no reason to make available the FSIA's special provisions governing an "agency or instrumentality" to a corporation that no longer possesses the sovereign attribute—ownership by a foreign state—that distinguishes that entity from other corporations.

* * * *

3. Petitioners also contend that the FSIA's "goal of protecting foreign relations" supports extending the FSIA's protections to a corporation that once was, but is no longer, an "agency or instrumentality of a foreign state." Dole Br. 45–46; see Dead Sea Br. 43–45. The FSIA seeks to protect, however, the *present* sovereign interests of foreign states (including their agencies and instrumentalities) when they are subjected to suit in United States courts, and not to regulate questions of procedure and substantive liability respecting private corporations that once were, but no longer are, owned by foreign states. The FSIA left those questions to other sources of law. See, *e.g.*, *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp. Int'l*, 493 U.S. 400 (1990) (discussing act of state doctrine).

In any event, as previously noted, the FSIA, like other statutes, does not pursue a single objective to the exclusion of others, but instead strikes a balance between the competing interests of foreign states and other litigants. The foreign state's interests in a suit against a *former* majority-owned corporation are likely to be even more attenuated than the foreign state's interests in a current subsidiary of a majority-owned corporation. Those interests do not provide a sufficient basis for rejecting the clear import of the statutory text and treating the corporation as if it retained a former status that the foreign state itself has terminated.

If the foreign state has divested all of its stock in the entity, or reduced its ownership from a majority to a minority stake, by the time of suit, then the foreign state's interests generally would not be substantially different than would be the case if the foreign state had never acquired the stock, or never had more than a minority stake, in the corporation. The FSIA's protections are plainly not available in the latter context. There is no persuasive

reason why the corporation should benefit from the FSIA's protections simply because the foreign state previously had, but no longer has, a majority ownership interest in the corporation.

As the court of appeals correctly recognized, once a foreign state has eliminated its majority ownership interest in a corporation, any "affront" to the foreign state arising from litigation against that corporation is likely to be "remote and indirect." Pet. App. 19a. It would, moreover, not be the sort of affront to which the FSIA is addressed—namely, that which may arise as a result of subjecting a foreign sovereign, as such, to the jurisdiction of United States courts without suitable protections. Indeed, despite petitioners' predictions that such litigation will cause "affronts to foreign sovereigns," Dole Br. 47, the United States has not encountered "diplomatic friction" arising from post-privatization litigation.

At bottom, if this Court were to accept petitioners' view that former majority-owned corporations are entitled to invoke the FSIA, the primary consequence may be simply to encourage private corporations that are no longer "agencies or instrumentalities" of a foreign state to seek strategic advantage in litigation (here, a federal rule of *forum non conveniens* that has no relation to the policies of the FSIA) by demanding the special procedures that the FSIA reserves for foreign sovereigns themselves. That consequence would undermine Congress's basic goal of providing foreign states with a measure of immunity that "would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. 1602.

* * * *

4. No *Jus Cogens* Exception to FSIA

a. Boshnjaku v. Federal Republic of Yugoslavia

In *Boshnjaku v. Federal Republic of Yugoslavia*, *supra,* 2002 U.S. Dist. LEXIS 13763 (N.D. Ill. 2002), a suit by Albanians against the Federal Republic of Yugoslavia, the Yugoslavian Armed Forces, the Republic of Serbia, the Serbian Armed Forces, and Slobodan Milosevic, Yugoslavia's former head of state, for damages resulting from the policy of "ethnic cleansing" of ethnic Albanians, the federal district court

rejected plaintiffs' contention that acts which violate *jus cogens* constitute an automatic waiver of sovereign immunity:

> Finally, plaintiffs argue that the defendants' acts constitute crimes against humanity and violations of accepted norms of international law and *jus cogens,* and that for this reason, the defendants cannot claim immunity—a waiver argument of sorts. But this argument provides no basis to avoid the immunity conferred by the FSIA. *See Princz*, 26 F.3d at 1174 (rejecting an argument that Germany's Third Reich had waived the country's sovereign immunity by violating *jus cogens* norms). Reaffirming the reluctance of the courts to find a waiver of immunity based on claimed violations of *jus cogens*, the court in *Sampson vs. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001), stated that "although international law is 'part of our law,' it does not follow that federal statutes must be read to reflect the norms of international law." *Id.* at 1152–53. The court went on to state that "the potential scope of a customary international law exception to foreign sovereign immunity, even in the *jus cogens* context, would allow for a major, open-ended expansion of our jurisdiction into an area with substantial impact on the United States 'foreign relations,'" and it therefore declined to recognize such an exception. *Id.* at 1156. In short, the fact that plaintiffs' claims concern violations of international law does not permit plaintiffs to avoid the immunity conferred on defendants by the FSIA.

b. Garb v. Republic of Poland

The same issue was addressed in *Garb v. Republic of Poland*, 207 F. Supp. 2d 16 (E.D.N.Y. 2002), a class action on behalf of Polish Jews against a Polish government agency, seeking compensation for a post-World War II nationalization program resulting in the expropriation of property owned by Polish citizens. The court dismissed the suit *inter alia* on the ground that the FSIA was not retroactively applicable. *See*

A.5.d. below. It also addressed and rejected the argument that a state is not entitled to immunity with respect to *jus cogens* violations, as set forth in excerpts below.

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* * * *

The theory that a foreign state should be deemed to have forfeited its sovereign immunity whenever it engages in conduct that violates fundamental humanitarian standards was formulated after the enactment of the FSIA. *See Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242 (2d Cir.1996) (citing Adam C. Belsky, Mark Merva, Naomi Roht-Arriaza, Comment, *Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 Calif. L.Rev. 365 (1989)). Prior to the enactment of the FSIA, the courts found an implied waiver of foreign sovereign immunity only where a foreign state brought suit in the United States or took some other action related to the conduct of litigation that manifested an intention to waive immunity. *See, e.g., Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356, 364, 75 S.Ct. 423, 99 L.Ed. 389 (1955) ("It is recognized that a counterclaim based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity."); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("[F]airness has been thought to require that when the sovereign seeks recovery, it be subject to legitimate counterclaims against it."). The House Report on the FSIA gave other examples of implied waiver under prior law:

> With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

H.R. No. 94–1487, at 18, *reprinted in* 1976 U.S.C.C.A.N., at 6617.

Section 1605(a)(1) of the FSIA provides that a foreign state "shall not be immune from the jurisdiction of courts in the United States [if] the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). In *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir.1996), the Second Circuit squarely "reject[ed] . . . the claim that a *jus cogens* violation constitutes an implied waiver [of foreign sovereign immunity] within the meaning of the FSIA." *Id.* at 245. The Second Circuit began its discussion of the doctrine of implied waiver by observing that it had "no doubt" that Congress, in enacting the FSIA, "ha[d] the authority either to maintain sovereign immunity of foreign states as a defense to all violations of *jus cogens* . . . or to remove such immunity. . . ." *Id.* at 242. Based primarily on the examples of implied waiver given in the above quotation from the House Report, the Second Circuit concluded that "Congress had not intended to remove the defense" of sovereign immunity for violations of *jus cogens*. *Id.* at 244. The other courts of appeals that have addressed the issue have all reached the same conclusion. *See Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir.2001) ("Congress did not create an implied waiver exception to foreign sovereign immunity under the FSIA for *jus cogens* violations."); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C.Cir.1994) ("We have no warrant . . . for holding that the violation of *jus cogens* norms by the Third Reich constitutes an implied waiver of sovereign immunity under the FSIA."); *Siderman*, 965 F.2d at 719 ("The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA."). Because plaintiffs' claim of implied waiver fails both under pre-FSIA law and under § 1605(a)(1) of the Act, I need not address the issue of the statute's retroactivity in this context.

* * * *

5. Retroactive Application of the FSIA

a. Hwang Gum Joo v. Japan

In *Hwang Gum Joo v. Japan*, 172 F. Supp. 2d 52, (D.D.C. 2001), the U.S. District Court for the District of Columbia

dismissed a complaint brought by former Korean "comfort women" against the government of Japan, holding that plaintiffs' claims did not fall within any of the exceptions to the general rule of immunity for sovereigns provided for in the FSIA. The court further held that even if Japan were subject to jurisdiction under the FSIA, the court could not exercise jurisdiction because plaintiffs' claims present a non-justiciable political question. For a more detailed description of *Hwang Gum Joo* and excerpts of the U.S. Statement of Interest in support of Japan's motion to dismiss filed at the district court level, *see Digest 2001* at 430–457.

The district court's decision was subsequently appealed to the U.S. Court of Appeals for the District of Columbia, and on October 4, 2002, the U.S. Government filed a brief setting forth the U.S. views that Japan was immune from suit on plaintiffs' claims under the FSIA and that the 1951 Treaty of Peace with Japan precluded litigation of plaintiffs' claims in federal courts.

Excerpts from the U.S. *amicus* brief in the D.C. Circuit are set forth below (footnotes omitted).

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

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ARGUMENT

I. UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT, JAPAN IS IMMUNE FROM SUIT IN UNITED STATES COURTS ON PLAINTIFFS' CLAIMS

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B. The FSIA's Exceptions Should Not Be Applied Retroactively To Provide For The Exercise Of Jurisdiction Where Jurisdiction Would Not Have Been Exercised At The Time Of the Challenged Conduct

The determination whether a statutory provision applies to conduct that predates its enactment turns, in the absence of an

explicit Congressional directive, on whether such application would upset preexisting rights. *See Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). Although, as this Court noted in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), most statutes governing jurisdiction do not affect substantive rights, *see id.* at 1170, the Supreme Court has subsequently clarified that there are circumstances in which a new jurisdictional provision has an effect that raises retroactivity concerns.

In *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997), the Supreme Court held that a statute creating jurisdiction over a claim that could not previously have been brought affects substantive rights and "is as much subject to our presumption against retroactivity as any other." *Id.* at 951. *Hughes* concerned an amendment to the False Claims Act that allowed a *qui tam* relator to bring a claim that previously could only be brought by the United States. This change, the Court held, "does not merely allocate jurisdiction among forums. 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.* In such circumstances, absent a clear congressional statement to the contrary, the courts will presume that Congress did not intend to create jurisdiction over claims that could not have been heard at the time they arose. *See Immigration and Naturalization Service* v. *St. Cyr*, 121 S. Ct. 2271, 2288–89 (2001) (statutes "will not be construed to have retroactive effect unless their language requires this result").

In a given statute, some provisions may be procedural or otherwise not affect substantive rights, and would apply to all subsequently filed cases, while other provisions affect substantive rights and liabilities, and are thus presumed inapplicable to suits involving pre-enactment conduct. Thus, in *St. Cyr*, the Court analyzed the question of retroactivity separately for each provision of the statute, concluding that some provisions of the statute at issue would present no question of retroactivity while other provisions, which affected substantive rights, were subject to a presumption against retroactive application. *See id.* at 2289. In undertaking this provision-by-provision analysis, the Court concluded that statements of congressional intent as to the

retroactive application of some provisions did not reflect any particular intent with regard to other provisions. *See ibid.*

Under the governing analysis, some provisions of the FSIA —such as the service of process and removal provisions—are procedural and presumptively apply to all litigation filed subsequent to the FSIA's effective date. Similarly, the FSIA's codification of the general rule of foreign sovereign immunity, 28 U.S.C. § 1604, and the common-law exceptions regarding waiver and counterclaims, which existed before the Tate letter, *see*, *e.g.*, *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); *Guaranty Trust Co. of New York* v. *United States*, 304 U.S. 126, 134–35 (1938), did not alter substantive rights, and presumptively apply to conduct that occurred before passage of the FSIA.

In contrast, exceptions to the general rule of foreign sovereign immunity that abrogated immunity and thereby provide for jurisdiction where immunity previously existed and jurisdiction would not have been exercised are, under *Hughes*, properly considered substantive. At least one court has held that the FSIA's "takings" exception was an entirely new creation, and thus not applicable to pre-FSIA conduct. *See Garb* v. *Republic of Poland*, 207 F. Supp. 2d 16, 25 (E.D.N.Y.). With respect to foreign states' commercial conduct, the FSIA was intended generally to codify prior practice, but only as it had existed since the issuance of the Tate letter in 1952. *Verlinden*, 461 U.S. at 488 (FSIA "[f]or the most part, codifies, as a matter of federal law, the restrictive theory of sovereign immunity"); 28 U.S.C. § 1605(a)(2). As discussed, prior to that time, conduct falling within the commercial activity exception would not have given rise to liability in United States courts. No intention to abrogate immunity and create new liabilities for conduct predating the adoption of these respective principles can be attributed to Congress absent a clear expression of intent.

Neither the language nor history of the FSIA contain the "clear indication," *St. Cyr*, at 2271, 2288–89, that would be required to upset foreign sovereigns' settled expectations regarding their amenability to suit. In one reference to timing, Congress delayed the effective date of the FSIA for ninety days after its enactment with the stated purpose of giving advance notice to foreign nations

of the changes worked by the statute in the United States' law concerning foreign sovereign immunity. Pub. L. No. 94–583, § 8, 90 Stat. 2898 (1976); *see* H.R. Rep. No. 94–1487 *reprinted in* 1976 USCCAN 6604, 6632 (90-day period "necessary in order to give adequate notice of the act and its detailed provisions to all foreign states"). While there are several possible explanations for this delay, it is, at the least, entirely consistent with an intent not to upset settled expectations.

The two courts of appeals to have squarely ruled on the question have correctly concluded that the FSIA's commercial activity exception should not be applied to upset settled expectations regarding conduct occurring during the pre-1952 period of nearly absolute sovereign immunity. In *Carl Marks & Co., Inc.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir. 1988), the Second Circuit held that the FSIA's commercial-activity exception was not available to obtain jurisdiction over a claim based on bearer bonds issued by Russia in 1916 because "[s]uch a retroactive application of the FSIA would affect adversely the USSR's settled expectation . . . of immunity from suit in American courts." Similarly, in *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1497–98 (11th Cir. 1986), the Eleventh Circuit held that the commercial-activity exception did not apply to litigation filed in 1979 concerning Chinese bearer bonds issued in 1911 and allegedly renegotiated in 1937. The court reasoned that "to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns" and would be "manifestly unfair." *See also Garb*, 207 F. Supp. 2d at 30; *Cruz* v. *United States*, 2002 WL 2001967, *5–*6 (N.D. Cal. August 23, 2002).

In other common law countries that have adopted statutes similar to the FSIA, the legislation either expressly provides that the exceptions to immunity are not retroactive or they have been so found by the courts. *See* United Kingdom: State Immunity Act, 1978, Sec. 23; Australia: Foreign States Immunities Act, 1985, § 7; Singapore: State Immunity Act, 1979, § 1; Canada: State Immunity Act, 1982 (held non-retroactive by *Patricia Carrato* v. *United States*, Supreme Court of Ontario, Court of Appeal, Oct. 17, 1983).

In urging a retroactive application of the commercial activity exception to conduct pre-dating the Tate letter, plaintiffs rely heavily upon this Court's discussion of the FSIA's retroactivity in *Princz*. In that opinion, which preceded both *Hughes* and *St. Cyr*, the Court, in dicta, questioned whether application of the FSIA to conduct predating the Tate letter would be "retroactive" in the problematic sense identified in *Landgraf*. *See Princz*, 26 F.3d at 1170. The Court expressed the view that the FSIA, as "a statute affecting jurisdiction," did not affect substantive rights. *See ibid.* The Court also noted that when Congress enacted the FSIA it repealed the provision in 28 U.S.C. § 1332 that gave courts diversity jurisdiction over suits by U.S. citizens against foreign governments. The Court thus questioned whether, if the FSIA were not retroactive, plaintiffs would be precluded from bringing suits even with respect to conduct that was not immune under pre-FSIA doctrine.

The Court's analysis is properly revisited in light of intervening Supreme Court precedent. *Hughes* made clear that a statute that creates jurisdiction over a claim that could not previously have been brought is substantive and therefore subject to the presumption against retroactive application. 520 U.S. at 951. The Supreme Court's provision-by-provision analysis of retroactivity in *St. Cyr* also resolves this Court's concern regarding partial repeal of 28 U.S.C. § 1332. *St. Cyr* makes clear that some portions of the FSIA may apply to pre-enactment conduct while others do not. In those classes of cases where the court could previously have exercised jurisdiction under 28 U.S.C. § 1332 it may exercise jurisdiction under the current 28 U.S.C. § 1330 and the correlative exception to sovereign immunity in Section 1605 of the FSIA. Thus, applying the teachings of *Hughes* and *St. Cyr*, the FSIA is properly interpreted so as to avoid undermining the settled expectations of either foreign governments or plaintiffs.

Because the Court in *Princz* believed that principles of retroactivity would not be implicated, its discussion in dicta did not analyze whether Congress had made sufficiently clear its intention to overcome the presumption against retroactivity. The Court noted, however, that in its statement of findings, Congress declared that the "[c]laims of foreign states to immunity *should*

henceforth be decided by courts of the United States and of the States in conformity with the principles set forth [in the FSIA]." 28 U.S.C. § 1602 (emphasis added). The Court stated that "[t]his suggests that the FSIA is to be applied to all cases decided after its enactment." 26 F.3d at 1170.

The general statement of purpose in Section 1602 lacks sufficient clarity to overcome the presumption against retroactivity that applies to certain FSIA exceptions. Indeed, the Eleventh Circuit in *Jackson* v. *People's Republic of China*, drew an inference opposite to that drawn by this Court, holding that this language "appeared to be prospective" only and counseled against retroactive application. 794 F.2d at 1497. As one district court has held, this disagreement among the courts of appeals about the proper interpretation of the "henceforth" language is itself evidence that statute is, at best, ambiguous. *See Cruz*, 2002 WL 2001967 at *4.

More fundamentally, the point of the statutory statement is that questions of immunity would henceforth be decided by the courts, rather than by the executive branch and based on legal principles rather than ad hoc foreign policy considerations. Some of the FSIA—including its exception for commercial activity—codified principles that the State Department had endorsed during the Tate letter regime. In enacting the FSIA, Congress shifted the task of applying those principles from the State Department to the courts, with the expectation that the doctrine would now be applied more consistently. *See* H.R. Rep. 94–1487, 1976 USCCAN 6604, 6606 ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process."). Thus, the statute provides that "[c]laims of foreign states to immunity should henceforth be decided *by courts of the United States and of the States* in conformity with the principles set forth [in the FSIA]." 28 U.S.C. § 1602 (emphasis added). This general statement of purpose manifests no intent to upset settled expectations. *See St. Cyr*, 121 S. Ct. at 2288–89.

In sum, in light of the Supreme Court's decisions in *Hughes* and *St. Cyr*, this Court, like the other courts to have ruled on the question, should conclude that the commercial activity exception does not apply retroactively to claims arising before the Tate letter regime was adopted.

C. Plaintiffs' Claims Do Not Come Within Any Of The FSIA's Exceptions

To the extent that the FSIA's exceptions to sovereign immunity apply to the pre-1952 conduct at issue here, the district court properly concluded that plaintiffs' claims do not come within any of the statute's exceptions.

1. Implied Waiver

Plaintiffs' argument that Japan impliedly waived its immunity by violating preemptive norms of international law, referred to as *jus cogens*, is precluded by *Princz*, which held that one could not infer from Germany's violations of human rights in the Holocaust "a willingness to waive immunity for actions arising out of the Nazi atrocities." *Princz*, 26 F.3d at 1174. Contrary to plaintiffs' suggestion, there has been no change in the domestic law of sovereign immunity since the *Princz* decision that would warrant revisiting that issue now. Indeed, since *Princz*, the Second and Seventh Circuits have each concurred with this Court's holding. *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). The fundamental premise of this Court's decision—that the courts cannot create new exceptions to the rule of immunity under the guise of applying the narrow "implied waiver" exception—remains sound. *See Princz*, 26 F.3d 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").

Congress recognized that the principle of waiver had been narrowly applied by the courts and intended that it be similarly applied under the FSIA. *See id.* at 1174.

2. Commercial Activity

Nor does the Japanese military's subjugation of plaintiffs to sexual slavery for Japanese soldiers during the war constitute "commercial activity" within the meaning of the FSIA. *See* 28 U.S.C. § 1605(a)(2). In applying the commercial activity exception, the critical question is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'" *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992). Not all conduct with a financial component is "commercial activity" within the meaning of the FSIA. Thus, in *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), the Court held that suit by an employee recruited to a hospital of the government of Saudi Arabia was barred under the FSIA notwithstanding the commercial nature of the relationship, because the plaintiff complained of imprisonment and torture, an abuse of the police power that is "not the sort of action by which private parties can engage in commerce." *Id.* at 361–62.

Likewise, here, although plaintiffs allege a financial aspect of Japan's conduct—that Japan charged a fee to soldiers who used the "comfort stations"—the essence of the challenged conduct was that, "pursuant to a premeditated master plan," the Japanese military took plaintiffs from their home countries, transferred them to the front lines, housed them in buildings constructed by the military, and forced them into sexual slavery to Japanese soldiers. *Joo*, 172 F. Supp. 2d at 63 (citing complaint); *see also* Complaint ¶¶ 77–82 (listing causes of action, including "war crimes and crimes against humanity"). As the district court held, such conduct "might be characterized properly as a war crime or a crime against humanity," but it was not conduct "typically engaged in by private players in the market" and it was not commercial in nature. *Ibid.* *See also McKesson HBOC, Inc.* v. *Islamic Republic of Iran*, 271 F.3d 1101, 1106 (D.C. Cir. 2001) ("commercial-activity

jurisdiction cannot exist unless the commercial activity that forms the basis for jurisdiction also serves as the predicate for the plaintiff's substantive cause of action"); *Cicippio* v. *Islamic Republic of Iran*, 30 F.3d 164, 167–68 (D.C. Cir. 1994) (noting that, under *Nelson*, suit involving kidnapping by government officials would have to be dismissed as sovereign, rather than commercial); *Letelier* v. *Republic of Chile*, 748 F. 2d 790, 797 (2d Cir. 1984) (kidnapping and assassination by foreign government was not "commercial activity," even though some private parties might engage in similar conduct).

Finally, even if plaintiffs could show that kidnapping and rape constituted commercial activity within the meaning of the FSIA, plaintiffs could not show the requisite nexus between their injury and the United States. *See* 28 U.S.C. § 1605(a)(2) (requiring that foreign act that is basis of suit must have a "direct effect in the United States"). None of the plaintiffs alleges that the conduct of which they complain had the kind of direct effect in the United States that could sustain jurisdiction here. *See Weltover*, 504 U.S. at 618 (effect is "direct" only "if it follows as an immediate consequence of the defendant's activity").

* * * *

b. In re Republic of Austria, Dorotheum GMBH & CO KG, and Osterreischische Industrieholding, AG

The plaintiffs in *In re Republic of Austria, Dorotheum GMBH & CO KG, and Osterreischische Industrieholding, AG* ("Whiteman") 2002 U.S. Dist. LEXIS 19984, were Austrian Jews and their descendants who brought suit against the Republic of Austria and Austrian companies for injuries stemming from Nazi atrocities between 1938 and 1945. In the district court, Austria, supported by the United States, moved to dismiss the complaint, arguing that at the time plaintiffs' complaints arose, states enjoyed virtually absolute immunity from suit and that subsequently adopted exceptions to the doctrine of foreign sovereign immunity do not apply retroactively to create jurisdiction. The district court refused

to grant Austria's motion to dismiss, ordered Austria to engage in discovery to determine whether other grounds for immunity may have been applicable, and denied Austria's motion for reconsideration. On December 20, 2002, the United States, in its *amicus* brief, urged the Second Circuit, to exercise interlocutory review of the district court's refusal to recognize Austria's immunity from suit.

Excerpts from the U.S. *amicus* brief below address the history of foreign sovereign immunity in the United States and issues of whether the FSIA's commercial activity and expropriation exceptions apply retroactively to cover the defendants' conduct during the Nazi era (footnotes omitted).

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

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* * * *

ARGUMENT

I. AUSTRIA IS IMMUNE FROM SUIT ON PLAINTIFFS' CLAIMS IN THE COURTS OF THE UNITED STATES

* * * *

A. As This Court Held In Carl Marks, The Commercial Activity Exception Does Not Apply To Plaintiffs' Claims

1. *Carl Marks* [*Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.1988)] recognized that prior to 1952, foreign governments had a "settled expectation, rising to the level of an antecedent right, of immunity from suit in American courts." 841 F.2d at 27. From *The Schooner Exchange* v. *M'Fadden*, 11 U.S. (7 Cranch) 116 (1812), until 1952, the United States adhered to the "absolute theory of sovereign immunity," pursuant to which "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 711 (1976)

(reprinting Letter of Acting Legal Adviser Jack B. Tate ("Tate Letter"). *See also Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

This policy changed when "the State Department issued the 'Tate Letter' in 1952, adopting the 'restrictive theory' of sovereign immunity." *Carl Marks*, 841 F.2d at 27. *See also Alfred Dunhill*, 425 U.S. at 711 (reprinting Tate Letter). In that letter, the State Department announced that henceforth it would recommend to United States courts, as a matter of policy, that foreign states be granted immunity only for their sovereign or public acts, and not for their commercial acts. *See Verlinden*, 461 U.S. at 486–87; *Carl Marks*, 841 F.2d at 27. As explained in the Tate letter, the State Department's adoption of the restrictive theory reflected an increasing acceptance of that theory by foreign states, as well as the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." *Alfred Dunhill*, 425 U.S. at 714 (reprinting Tate Letter).

Foreign sovereign immunity practice entered its third (and current) phase when Congress enacted the FSIA, which became effective in January, 1977. Pub. L. No. 94–583, 90 Stat. 2891 (1976) *codified at* 28 U.S.C. §§ 1330, 1602, *et seq*. The FSIA contains a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden*, 461 U.S. at 488. The FSIA sets forth a general rule that foreign states are immune from suit in American courts. 28 U.S.C. § 1604. Courts may exercise jurisdiction over foreign states *only* if the suit comes within one of the specific exceptions to that rule established by Congress. *See id.* §§ 1605–07.

By adopting a statute to govern comprehensively the question of foreign sovereign immunity, Congress intended to relieve the State Department of the diplomatic pressures associated with case-by-case decisions and to establish legal principles to guide the courts. *See Verlinden*, 461 U.S. at 488. The FSIA now " 'provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.' " *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993).

2. In *Carl Marks*, the Court specifically held that the FSIA's commercial activity exception does not apply retroactively to claims that arose prior to the 1952 Tate Letter, when courts would not have exercised jurisdiction over them. The Court recognized that "only after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions." *Carl Marks*, 841 F.2d at 27 (citation omitted). Thus, to apply the FSIA's commercial activity exception to pre-1952 conduct "would affect adversely [foreign governments'] settled expectation, rising 'to the level of an antecedent right,' of immunity from suit in American courts." *Ibid. See also Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1497–98 (11th Cir. 1986) ("to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns").

3. In its order rejecting Austria's claim to sovereign immunity, the district court questioned the continued vitality of *Carl Marks*. *See* Order of June 5, 2002, at 2–3. The district court further held that plaintiffs could avoid the effect of *Carl Marks* by alleging that Austria had refused, post-1952, to make adequate compensation for pre-1952 wrongs. *See id.* at 3 (citing 1st Amended Compl. at ¶¶ 16–18, 24 (alleging an official policy "to delay, impede, thwart and at any cost avoid and evade restitution or recompense to Austria's Jews" for wrongs committed during the 1938–45 period)). The district court was wrong on both counts. Subsequent decisions by the Supreme Court have confirmed that this Court's analysis and holding in *Carl Marks* was correct. And plaintiffs cannot circumvent the rule in *Carl Marks* merely by pleading that Austria continues to deny compensation on claims as to which it enjoys sovereign immunity.

* * * *

b. The Supreme Court's *Hughes* and *St. Cyr* decisions confirm the approach adopted by this Court in *Carl Marks*. Under *Hughes* and *St. Cyr*, some provisions of the FSIA—such as the service of process and removal provisions—are purely procedural and presumptively apply to all litigation filed subsequent to the FSIA's effective date. Notably, the district court in *Carl Marks* assumed the applicability of these provisions to the litigation, even though

it held that the commercial activity exception was not available on plaintiffs' pre-1952 claims. *See Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 665 F. Supp. 323, 328–31 (S.D.N.Y. 1987) (discussing effectuation of service under 28 U.S.C. § 1608). Similarly, the FSIA's codification of common-law exceptions to immunity regarding waiver and counterclaims, which existed even before the Tate letter, *see*, *e.g.*, *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); *Guaranty Trust Co. of New York* v. *United States*, 304 U.S. 126, 134–35 (1938), would apply regardless of when the claims arose. *See Carl Marks*, 841 F.2d at 27 (indicating that the district court could have exercised jurisdiction under a theory of waiver if plaintiffs had been able to show that the USSR had "consented to suit").

In contrast, the presumption against retroactivity precludes application of the FSIA's other exceptions in such a way as to "eliminate[] a defense to * * * suit" that existed at the time of the challenged conduct. *Hughes*, 520 U.S. at 948. Thus, the commercial activity exception, § 1605(a)(2), does not apply to a foreign states' commercial conduct that pre-dated the Tate Letter, *Carl Marks*, 841 F.2d at 27, but it does apply, as the Court suggested, to conduct after the Tate Letter because "after 1952 * * * it [was] reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transaction," *ibid*. *See also Verlinden*, 461 U.S. at 488 (FSIA "[f]or the most part, codifies, as a matter of federal law, the restrictive theory of sovereign immunity").

c. The Ninth Circuit's recent holding in *Altmann* v. *Austria*, 2002 WL 31770999 (9th Cir. Dec. 12, 2002), that Austria *could* be sued under the FSIA for its conduct during the Nazi era is flawed in numerous respects. First, the Ninth Circuit mistakenly believed that Austria would not have been entitled to immunity for its Nazi-era conduct even prior to the 1952 Tate Letter. *Id.* at *7–*8. The court based this view in part on its understanding that during the pre-1952 period, immunity was only accorded to "friendly" foreign governments. *Id.* at *7. The court does not, however, cite any instance in which a non-consenting foreign sovereign was denied immunity because it was not "friendly," and we are aware of none. In fact, such an argument was expressly

rejected in *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 138 N.E. 24 (N.Y. 1923).

The Ninth Circuit further relied on the so-called "*Bernstein* Letter" as evidence that the United States would not have recognized Austria's immunity from suit even prior to the Tate Letter. In the *Bernstein* Letter, the State Department announced a policy "to relieve American courts of any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." *Altmann*, 2002 WL 31770999, *8 (quoting April 13, 1949 letter of Jack B. Tate, *reprinted in Bernstein* v. *N.V. Nederlandshe-Amerikaansche*, 210 F.2d 375, 376 (2d Cir. 1954)). The *Bernstein* Letter did not address the doctrine of foreign sovereign immunity, but rather the act of state doctrine. While the United States did not recognize the validity of Nazi expropriations for purposes of the act of state doctrine, Nazi governments were still immune from suit on such claims in our courts. This Court has acknowledged the significance of the distinction. In *Zwack* v. *Kraus Bros.*, 237 F.2d 255 (2d Cir. 1956), the Court recognized the Hungarian government's immunity from suit while declining, under the policy of the *Bernstein* letter, to recognize the validity of the challenged expropriation. *See id.* at 260–61.

Finally, the Ninth Circuit cited the fact that certain of those responsible for Nazi atrocities had been prosecuted criminally at Nuremberg as evidence Austria's immunity would not have been recognized. *See Altmann*, 2002 WL 31770999, *9. But, the fact that individual Nazis could be criminally prosecuted in an international tribunal does not mean that Austria was subject to suit by private plaintiffs in American courts. Indeed, the conflation of these two issues is directly contrary to the Supreme Court's holding in *Hughes*. *See* 520 U.S. at 951 (defendant's prior susceptibility to suit by the *government* did not alter fact that new prospect of suit by *private* plaintiff was substantive change in the law).

The Ninth Circuit further held that application of later-adopted immunity exceptions was appropriate because it would not upset Austria's expectations at the time. The court noted that Austria had adopted the restrictive theory of immunity in the 1920s. *Altmann*, 2002 WL 31770999, *8. But that fact is irrelevant. The

court does not cite any instance in which a foreign sovereign was denied immunity because it applied the restrictive theory of immunity in its own courts. As the Tate Letter stated, the U.S. had previously followed the "absolute" theory of immunity, under which "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *See Alfred Dunhill*, 425 U.S. at 711. The Ninth Circuit's analysis makes a foreign government's susceptibility to suit turn on "the defendant country's acceptance of the restrictive principle of sovereign immunity." *Altmann*, 2002 WL 31770999, *9 (indicating that Russia, China, and Mexico, which had not accepted the restrictive theory until later, would be immune). But there is no indication that Congress, in enacting the FSIA, desired different countries to be subject to distinct immunity rules. To the contrary, one of Congress's purposes in adopting the FSIA was to ensure a more uniform application of sovereign immunity principles. *See* H.R. Rep. 94–1487, 1976 USCCAN 6604, 6606.

In sum, there was no basis for the district court to question the continued validity of this Court's holding in the *Carl Marks* case. Subsequent Supreme Court decisions confirm this Court's conclusion that the commercial activity exception does not apply retroactively to claims arising before the Tate letter regime was adopted.

* * * *

B. Under Circuit Precedent, Neither May The FSIA's Expropriation Exception Be *Applied to Austria's Conduct At Issue Here*

The Court's reasoning in *Carl Marks* applies with equal force to plaintiffs' contention that the district court may exercise jurisdiction over Austria's Nazi-era expropriations under the expropriation exception of the FSIA, 28 U.S.C. § 1605(a)(3). *See Garb* v. *Republic of Poland*, 207 F. Supp. 2d 16, 27 (E.D.N.Y. 2002) (to the extent § 1605(a)(3) "overruled prior law, the holding in *Carl Marks* makes clear that it cannot be applied retroactively").

American law did not recognize an expropriation exception to foreign sovereign immunity in the 1930s or 40s, at the time Austria

is alleged to have taken plaintiffs' property. As the Tate Letter made clear, prior to 1952, the United States adhered to the "absolute theory of sovereign immunity," under which "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Alfred Dunhill*, 425 U.S. at 711 (reprinting Tate Letter). *See also Verlinden*, 461 U.S. at 486. Thus, application of the FSIA's expropriation exception to Austria's Nazi-era expropriations would have the same substantive effect on settled rights as would retroactive application of the commercial activity exception.

In fact, even the restrictive theory of immunity adopted in the 1952 Tate Letter did not recognize an exception to immunity for suits based upon a foreign government's expropriation of property within its territory. In the *Altmann* decision, the Ninth Circuit asserted, without authority, that expropriation claims could be brought under the restrictive theory of immunity. *See* 2002 WL 31770999 at *9 (positing that because Austria had adopted the restrictive theory in the 1920s, it "could have had no reasonable expectation of immunity in a foreign court" as to an expropriation claim). To the contrary, however, the expropriation exception to sovereign immunity was not recognized in U.S. law until the FSIA's enactment in 1976. In *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), the Court held that even under the restrictive theory foreign sovereigns enjoyed immunity with respect to suits challenging "strictly political or public acts about which sovereigns have traditionally been quite sensitive," including "internal administrative acts" and "legislative acts, *such as nationalization*." *Id.* at 360 (emphasis added). *See also Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971) (quoting same). Thus, under the reasoning of *Carl Marks*, the expropriation exception should not apply to any conduct pre-dating the FSIA.

Nor can plaintiffs assert claims based upon Austria's continued refusal, post-1976, to return or pay compensation for property it had expropriated in the 1930s and 40s. As the Federal Circuit has held, a takings claim arises "when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *Hopland Band of*

Pomo Indians v. *United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988); *Kinsey* v. *United States*, 852 F.2d 556, 557 (Fed. Cir. 1988). On this basis, the Federal Circuit has frequently dismissed takings claims as time-barred. *See Fallini* v. *United States*, 56 F.3d 1378, 1382–83 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1243 (1996); *Creppel* v. *United States*, 41 F.3d 627, 631 (Fed. Cir. 1994); *Alliance of Descendants of Texas Land Grants* v. *United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994); *Steel Improvement & Forge Co.* v. *United States*, 174 Ct. Cl. 24, 29–30 (1966); *Stafford Ordnance Corp.* v. *United States*, 123 Ct. Cl. 787, 793 (1952). The same rationale precludes plaintiffs from asserting claims now, under an immunity exception adopted in 1976, based upon takings that were completed some sixty years ago.

* * * *

c. Cruz v. U.S.

In *Cruz v. U.S.*, 219 F. Supp. 2d 1027 (N.D.Cal. 2002), discussed in Chapter 4.C.a. the district court dismissed all claims against Mexican defendants on the basis of sovereign immunity. In doing so, the court held that the FSIA did not apply retroactively. Therefore, because the acts on which the claims in this case were based all occurred prior to 1952, the applicable standard was not the FSIA but rather the law of sovereign immunity in effect in the United States at that time. That law was absolute sovereign immunity. In reaching this decision, the court explained as set forth below (footnotes omitted).

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* * * *

The FSIA states that: "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. At first glance, the language "should henceforth" suggests prospective application only. However, the language of prospectivity speaks in relation to the actual making of a claim of immunity, not in relation to the underlying events giving rise to a

cause of action, suggesting, perhaps, that the FSIA should apply to all claims of immunity made after 1976, regardless of the time-frame in which the events giving rise to the action occurred.

* * * *

Given this dichotomy, the FSIA is clearly a statute which would operate "retroactively" if given effect in this case. If the FSIA is applied to pre-1952 events, some suits against sovereigns may be brought that otherwise would have been barred. It is too much to argue that application of the FSIA to this case would merely mean that the Mexican Defendants could be sued here in the United States as well as in Mexico Rather, application of the FSIA to the case at bar would affect not "only where a suit may be brought," but rather "whether it may be brought at all." Id.

* * * *

This conclusion is consistent with the overall intent of the FSIA. As the Supreme Court has stated: "The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality. . . ." First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 620, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983). It is difficult to imagine what could be more substantive than a sovereign's expectation of absolute immunity. Indeed, it is clear that the intent of the FSIA was to codify a policy—the restrictive theory of sovereign immunity—adopted twenty-four years earlier in 1952, not to change pre-1952 law.

Because the legislative language regarding the proper scope of the FSIA is ambiguous and the application of the FSIA to events occurring before 1952 would have impermissible retroactive effect, the Court concludes that the FSIA is not applicable to any claims arising prior to 1952. Instead, the Mexican Defendants are absolutely immune to any claims that arose prior to 1952. . . .

* * * *

By December 31, 1947 all agricultural braceros had been repatriated to Mexico or their contracts had been terminated and they were in the United States illegally. See Memo from

Wilson R. Buie to William A. Anglim, PMA, USDA, "Final Report on Activities of Foreign Farm Labor Program," Jan. 30, 1948, P3. In all subsequent agreements between the United States and Mexico, Mexico was to play no role in return of the Savings Fund deductions. In fact, no Savings Fund deductions, of any kind, were authorized after October of 1948. With regard to the railroad braceros, that program was fully terminated by 1946. Therefore, any cause of action against the Mexican Defendants arose prior to 1952.

* * * *

d. Garb v. Republic of Poland

In *Garb v. Republic of Poland*, 207 F. Supp. 2d 16 (E.D.N.Y. 2002), a class action had been brought on behalf of Polish Jews against a Polish government agency, seeking compensation for a post-World War II nationalization program that expropriated property owned by Polish citizens. The district court dismissed the suit *inter alia* on the ground that the FSIA was not retroactively applicable. Plaintiffs had relied primarily on two of the exceptions to immunity specified in the FSIA: the commercial activity exception, § 1605(a)(2), and the takings exception, § 1605(a)(3). The court noted that "the operative events leading to the expropriation of plaintiffs' property occurred prior to 1952, when the defendants enjoyed immunity from suit for their commercial activities and for the expropriation of property, the latter exception continuing until the enactment of the FSIA in 1976." *Garb*, 207 F. Supp. 2d at 21. In view of the decision of the Second Circuit in *Carl Marks & Co. v. Union of Soviet Socialist Republics,* 841 F.2d 26, 27 (2d Cir. 1988) (holding that the exceptions to the FSIA that changed prior law could not be applied retroactively), the court examined whether the commercial activity and takings exceptions applied retroactively and determined they did not. That analysis and the applicability of the FSIA to governmental departments or ministries are set forth in excerpts below. *See also* A.4.b., *supra.*

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* * * *

The real issue [is] whether, prior to the adoption of the FSIA in 1976, Poland enjoyed immunity from suit in the United States for the discriminatory taking of Jewish property even if other legal principles did not stand in the way of the successful prosecution of such an action. The answer is that a foreign state did enjoy such immunity prior to the enactment of the FSIA. To the extent that the FSIA overruled prior law, the holding in *Carl Marks* makes clear that it cannot be applied retroactively. Also unsustainable is plaintiffs' argument that defendants' conduct has been, and is, ongoing. . . .

Although plaintiffs do not expressly so argue, some courts have held that the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), establishes the full retroactivity of the FSIA and thus effectively overrules the Second Circuit's decision in *Carl Marks*. See, e.g., *Haven v. Rzeczpospolita Polska (Republic of Poland),* 68 F.Supp.2d 943, 946 (N.D. Ill. 1999) (FSIA applicable to claims virtually identical to those asserted here); *Altmann v. Republic of Austria*, 142 F.Supp.2d 1187, 1201 (C.D. Cal. 2001) (FSIA applicable to claim for taking of artwork by Nazis in 1938); see also *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1170 (D.C. Cir. 1994) (suggesting, but not deciding, that "all questions of foreign sovereign immunity, including those that involve an act of a foreign government taken before 1976, are to be decided under the FSIA"). In *Landgraf*, the Supreme Court provided an analytical framework for determining the retroactivity of a statute. See *Landgraf*, 511 U.S. at 263–80, 114 S.Ct. 1483. . . .

Nothing in the Court's decision in Landgraf overruled the Second Circuit's ruling in *Carl Marks* that a foreign state's settled expectation of immunity from the jurisdiction of the United States courts "ris[es] to the level of an antecedent right," *Carl Marks*, 841 F.2d at 27 (internal quotation marks omitted). Indeed, as the quotation set forth in the preceding paragraph shows, the Court simply reaffirmed in Landgraf the principles of retroactivity that it had been applying since at least as early as its decision in *Hallowell v. Commons*, 239 U.S. 506, 36 S.Ct. 202, 60 L.Ed. 409 (1916). Moreover, the Court's conclusion in Landgraf—that the relevant provisions of the Civil Rights Act of 1991 did not apply

retroactively, *Landgraf*, 511 U.S. at 293, 114 S.Ct. 1483—provides no support for the argument that the FSIA applies retroactively. . . .

This approach is also consistent with the language of the FSIA, which defines a foreign state as including its political subdivisions as well as its agencies and instrumentalities. 28 U.S.C. § 1603(a). While the Act treats agencies and instrumentalities differently from the foreign state itself for a variety of purposes, see, e.g., 28 U.S.C. §§ 1606 (liability for punitive damages), 1608 (service of process), 1610 (attachment and execution), including takings claims of the kind present here, it makes no distinction between political subdivisions and the foreign state itself. A scholarly commentary on the FSIA observes that "[s]o long as an entity functions essentially in a political or governmental capacity while subordinated in some fashion to a foreign state itself, the entity is a political subdivision of a foreign state. Political subdivisions therefore include both units of local or regional government, or units of the national government which do not represent the government as a whole." Joseph W. Dellapenna, Suing Foreign Governments and Their Corporations 19 (1988) (emphasis added). The Second Circuit has adopted this interpretation of the term "political subdivision," holding that an Italian public financial entity qualified as a political subdivision under the FSIA. *O'Connell Mach. Co. v. M.V. "Americana"*, 734 F.2d 115, 116–17 (2d Cir. 1984) (quoting H.R. No. 94–1487, at 15, reprinted in 1976 U.S.C.C.A.N., at 6613 (stating that "[t]he term 'political subdivisions' includes all governmental units beneath the central government")).

Numerous other courts have assumed without discussion that governmental departments or ministries qualify as political subdivisions of a foreign state under the FSIA. See, e.g., *Magness v. Russian Fed'n*, 247 F.3d 609, 613 n. 7 (5th Cir. 2001) (characterizing Russian Ministry of Culture as political subdivision of Russia for *38 purposes of service of process); *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1298 (11th Cir. 2000) (characterizing Yemeni Ministry of Supply & Trade as political subdivision of Yemen for purposes of determining legal status of entity controlled by Ministry); *Kao Hwa Shipping Co. v. China Steel Corp.*, 816 F. Supp. 910, 914 (S.D.N.Y. 1993) (characterizing

Taiwanese Ministry of Economic Affairs as political subdivision of Taiwan for purposes of determining legal status of entity owned by Ministry); see also *Filus v. LOT Polish Airlines*, 819 F. Supp. 232, 236–37 (E.D.N.Y. 1993) (Nickerson, J.) (characterizing Ministry of Civil Aviation of USSR alternately as foreign state itself and as political subdivision thereof for purposes of service of process).

In sum, it is arguable whether in the instant case the Ministry of the Treasury can be viewed as a legal entity separate from the Republic of Poland. On the contrary, it appears to be an integral part of the Republic of Poland or a political subdivision thereof; any money judgment here would be paid by the Republic of Poland, and any order directing the return of expropriated property would compel the Ministry of the Treasury to divest itself of property held on behalf of the Republic of Poland, assuming that the Ministry still holds title to it. Under these circumstances, permitting the cause of action here would appear to undermine the immunity Congress intended to confer on the Republic of Poland under the FSIA.

* * * *

See also Turkmani v. Republic of Bolivia, 193 F. Supp. 2d 165 (D.D.C. 2002), a suit by the holder of certain bonds issued by the Republic of Bolivia, in which the district court held that the FSIA, and in particular its exception for commercial activities, applied to bonds issued prior to its effective date.

6. Exceptions to Immunity

a. Waiver

In *In re China Oil and Gas Pipeline Bureau*, 94 S.W.3d 50 (Tex. Ct. App. 2002), the Texas state appellate court held that a claim of immunity under the FSIA is in the nature of a special appearance in that it precludes a trial court from exercising jurisdiction over a suit brought against a foreign

sovereign unless an exception is applicable, and that defendant had not implicitly waived immunity in this case. The decision involved a suit by the sole shareholder of a Texas corporation, who had agreed to form and manage a joint venture company with an oil company that was wholly owned by the Chinese government, against that oil company, its president, and other individuals for breach of contract, breach of fiduciary duty, and fraud. Defendant China Oil moved to dismiss for lack of jurisdiction, and denied that it had waived its immunity by sending letters to the court contesting jurisdiction on the basis of a contractual clause requiring arbitration in China. The trial court rejected that contention. The court of appeals disagreed, noting that the FSIA's waiver exception is narrowly construed and that courts have found an implicit waiver only when waiver was unmistakable. In each letter, the court noted, China Oil insisted it was not amenable to suit in the United States and evinced no "conscious intent" to take part in the litigation.

b. Commercial activity

(1) The U.S. Court of Appeals for the Second Circuit held in *Filtech S.A. v. France Telecom S.A.*, 304 F.3d 180 (2d Cir. 2002) that the sale of data processing services in the United States by the French telephone company, which was a government instrumentality, failed to establish sufficient commercial activity to permit plaintiff to invoke the commercial activity exception in the first clause of § 1605(a)(2) in a civil antirust action. The district court had denied dismissal for lack of subject matter jurisdiction but granted it on grounds of international comity. On cross-appeals, the court of appeals vacated and remanded. On remand, the district court granted the telephone company's motion to dismiss under the FSIA; that decision was affirmed by the appellate court's holding.

(2) BP Chemicals Ltd., a British corporation, sued Jiangsu Sopo Corporation, alleging violations of the Lanham Act,

the International Convention for the Protection of Intellectual Property, the Missouri Uniform Trade Secrets Act and Missouri common law. Sopo claimed immunity under the FSIA because it is owned by the Government of the People's Republic of China. The district court agreed and dismissed BP's action for lack of subject matter jurisdiction. The Court of Appeals for the Eighth Circuit reversed and remanded, holding that a claim for misappropriation of trade secrets under Missouri Uniform Trade Secrets Act (MUTSA) was based upon defendant's commercial activity carried on in the United States, and thus came within the commercial activity exception. *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002).

(3) Virtual Countries, Inc., an Internet domain name company, claimed the legal right to the domain name "southafrica.com." The Republic of South Africa contested that claim, asserting that sovereign countries have a preeminent claim to own their own domain names. It issued a press release stating its intent to file an application claiming the www.southafrica.com domain with the World Intellectual Property Organization ("WIPO") because it wanted to use that domain as a "strategic marketing tool in promoting trade and tourism." Virtual Countries brought an action against the Republic of South Africa and its Tourism Board ("SATOUR") in the U.S. District Court for the Southern District of New York, seeking a declaration that South Africa lacked rights to the domain name and claiming that the press release had adversely affected its short and long-term business operations. The district court dismissed on the ground that South Africa was immune from suit under the FSIA, *Virtual Countries, Inc, v. Republic of South Africa and South African Tourism Board* 148 F. Supp. 2d 256 (S.D.N.Y. 2001). Affirming the district court's dismissal, the Court of Appeals for the Second Circuit held that issuance of the press release was not a "commercial" activity and in any event that plaintiff had failed to show the requisite causal connection

between defendants' alleged acts and its own alleged injuries. *Virtual Countries, Inc, v. Republic of South Africa and South African Tourism Board*, 300 F.3d 230 (2d Cir. 2002).

(4) *Croesus EMTR Master Fund L.P. v. The Federative Republic Of Brazil*, 212 F. Supp. 2d 30 (D.D.C. 2002), involved a breach of contract action against the Republic of Brazil, in which plaintiffs sought to overcome the defendant's claim of immunity by arguing that the FSIA's commercial activity exception was triggered by Brazil's purported promotion of bonds in the secondary markets in the United States. The district court disagreed on the ground that the action was not "based on" any Brazilian misrepresentations. It also found that the "commercial activity" and "direct effect" immunity exceptions were not triggered by alleged omissions concerning the value of Brazilian bonds or by failure to pay interest and principal on the bonds. The court concluded that dismissal on *forum non conveniens* grounds was appropriate.

(5) In its brief in opposition to a petition for certiorari, filed in the Supreme Court July 24, 2002, in *Islamic Republic of Iran v. McKesson HBO, Inc.*, 271 F.3d 1101 (D.C. Cir. 2001), the Overseas Private Investment Corporation ("OPIC") argued that Iran was mistaken in contending that it was entitled to sovereign immunity under the FSIA in an expropriation action. Although OPIC argued that the Supreme Court should not grant certiorari because the issue did not warrant review, it also addressed the issue of Iran's claim on this issue. Certiorari was denied on October 7, 2002. *Islamic Republic of Iran v. McKesson HBO, Inc.*, 123 S.Ct. 341 (2002). For a description of the case, *see* Chapter 4.C.b. Excerpts from the OPIC brief are set forth below (footnotes omitted). The full text of the brief is available at *www.usdoj.gov/osg/briefs/search.html*.

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3. Petitioner reasserts (Pet. 14–17) its claim of foreign sovereign immunity, contending that this Court's decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), requires that the "act" of a foreign sovereign on which jurisdiction is based, for purposes of 28 U.S.C. 1605(a)(2), must also form an element of the cause of action. That argument, which rests on a misapprehension of both Nelson and respondents' claims in this case, is incorrect.

Nelson held that a plaintiff cannot obtain jurisdiction under the FSIA's commercial activity exception, 28 U.S.C. 1605(a)(2), to sue on a cause of action that is itself based entirely on a sovereign's non-commercial activity. 507 U.S. at 356–358. To determine whether the claim was "based upon" the act giving rise to jurisdiction, the Court analyzed whether the jurisdictional acts were among the principal elements of the cause of action. Id. at 357. Petitioner mistakenly interprets Nelson to require that every element of the cause of action must also be an act that confers jurisdiction under Section 1605(a)(2). But this Court expressly rejected that notion. See *Nelson*, 507 U.S. at 358 n. 4. Moreover, there would have been no occasion for such a conclusion in *Nelson* because the Court concluded that the jurisdictional commercial activities in that case formed no basis for the cause of action. Nelson is satisfied here if commercial activity forms the central basis of the cause of action.

Contrary to petitioner's characterizations, this is a claim for expropriation, not merely for "the cut-off of commercial contacts" or for "the non-payment of dividends." Pet. 16. As the court of appeals recognized, respondents alleged the expropriation took place when petitioner, "acting through its various co-defendants on Pak Dairy's Board of Directors, used its majority position to lock [McKesson] out of the management of the company and deny [McKesson] its share of the company's earnings in the form of dividends." Pet. App. 149a (quoting district court); see also id. at 7a (describing the commercial activity as "freezing-out American corporations in their ownership of Pak Dairy") (quoting id. at 152a). The specific acts are laid out in the complaint (McKesson Lodging L169–L176) and affidavits (see, e.g., id. at L31–L41). Thus, the theory of this suit is that the repeated failure to pay dividends worked in combination with other actions (in particular,

as the district court found, the exclusion of McKesson from any voice in Pak Dairy's decisions and the cutoff of contacts with McKesson) to demonstrate that the expropriation was complete. See Pet. App. 7a–8a, 115a. And, as we explain below, the court of appeals concluded that those actions resulted in direct effects felt in the United States (the interruption of the "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran"). Id. at 167a (quoting id. at 151a). That conclusion presents no conflict with Nelson.

4. Petitioner also argues (Pet. 17–20) that, under this Court's ruling in *Republic of Argentina v. Weltover, Inc.* 504 U.S. 607 (1992), the commercial activity exception applies only if a specific payment or performance is required to be made in the United States. *Weltover* imposes no such rule. Weltover sustained the exercise of jurisdiction under 28 U.S.C. 1605(a)(2) because the foreign sovereign there was obliged to make interest payments on bonds in New York. 504 U.S. at 619. In that case, "the plaintiffs [were] all foreign corporations with no other connections to the United States" who nevertheless chose to designate New York as the place for payment. Id. at 618–619. The Court ruled that this choice was sufficient to satisfy the "direct effect" requirement. Ibid. The Court did not rule out the possibility that other types of activities could establish a "direct effect" in the United States.

In this case, petitioner's disruption of a United States' corporation's investment in and relationship with Pak Dairy brought to a halt the "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of Pak Dairy." Pet. App. 167a; id. at 151a. The court of appeals ruled, on the facts before it, that this "constant flow * * * between the United States and Iran"—like the obligation to deliver money to a New York bank in *Weltover*—established a sufficient connection with the United States that the effects of its disruption were plainly felt in this country, within the meaning of 28 U.S.C. 1605(a)(2).

The question whether the nature of a transnational commercial relationship is sufficient to create a "direct effect" is necessarily a

fact-specific one. The court of appeals' resolution of that question in this case does not conflict with *Weltover* or with any of the lower-court decisions cited by petitioner (Pet. 18–19 nn. 14–16) and accordingly does not warrant review by this Court.

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c. Tort

The tort exception to the FSIA, 28 U.S.C. § 1605(a)(5), was addressed by the District Court for the District of Columbia in *Maalouf v. the Swiss Confederation*, 208 F. Supp. 2d 31 (D.D.C. 2002). The complaint had been brought by a U.S. citizen who had been seriously injured while sledding on the grounds of the Swiss Embassy in Washington. Defendant's claim of immunity under the FSIA was rejected. The court noted that the FSIA waives jurisdictional immunity for claims of money damages for personal injury or death, unless, *inter alia*, the case "is based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused. . . ." The burden of proof is on the defendant to demonstrate by a preponderance of the evidence that the discretionary exception applies. In the instant case, the court determined that the relevant acts of the embassy were not "discretionary" within the meaning of the statute, but were analogized to the acts of a private citizen, to which no immunity attached. Accordingly, the court found subject matter and personal jurisdiction in this case and denied defendant's motion to dismiss.

d. Acts of terrorism

In 1996, the FSIA was amended to provide an exception to immunity where "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

. . . for such an act or provision 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. . . ." 28 U.S.C. § 1605(a)(7). Such liability may include economic damages, solatium, pain and suffering, and punitive damages.

(1) Roeder v. Islamic Republic of Iran

On April 18, 2002, the U.S. District Court for the District of Columbia vacated a default judgment and dismissed a suit brought by former hostages held in Tehran from 1979 to 1981. *Roeder v. The Islamic Republic of Iran*, 195 F. Supp. 2d 140 (D.D.C. 2002). Plaintiffs had failed to advise the court at the default judgment stage that the suit was contrary to U.S. obligations in the General Declaration of the Algiers Accords, 20 I.L.M. 223 (1981), which specifically "bars and precludes" prosecution of claims against Iran by a U.S. national "related to (A) the seizure of the 52 United States nationals on November 4, 1979, [or](B) their subsequent detention. . . ." As to the FSIA, while the litigation was pending, Congress enacted § 626(c) of the Commerce, Justice, State Appropriations Act of 2002, Pub. L. No. 107-77, 115 Stat. 748 (2001) amending the FSIA by adding a specific reference to the *Roeder* case to the list of exceptions to sovereign immunity in 28 U.S.C. § 1605(a)(7)(A). A technical amendment to Subsection 626(c) was enacted in § 208 of the Department of Defense and Emergency Supplemental Appropriations Act, Pub. L. 107-117, 115 Stat. 2230 (2001). *See Digest 2001* at 460–475.

In dismissing the claim, the district court reviewed the potentially relevant statutory provisions, including those enacted with specific reference to the Roeder litigation. The court held:

> Plaintiffs do not have a cause of action against Iran because the Algiers Accords require that this suit be dismissed. The language of the FSIA, as amended by the 1996 Antiterrorism Act, the Flatow Amendment,

> Subsection 626(c), and Section 208, does not unambiguously create a cause of action against Iran. Because that statute is ambiguous, and because none of the legislation at issue here ever mentions the Algiers Accords in statutory text or legislative history, this Court can not interpret this legislation to implicitly abrogate a binding international agreement. Therefore this Court must dismiss plaintiffs' claims.

Furthermore, while neither the FSIA nor the 1996 Antiterrorism Act created a private cause of action for the victims of state-sponsored terrorism, that cause of action was provided in an amendment to another appropriations act, known as the "Flatow Amendment," Pub. L. No. 104–208, § 589, 110 Stat. 3009–172, 1996 (codified at 28 U.S.C. 1605 note.) The court concluded that the provision did not apply to suits against the foreign state itself:

> [T]he plain text of this appropriations rider does not create a cause of action against a foreign government that sponsors terrorism—it creates a cause of action only against the "official, employee, or agent" of such a state who participates in the terrorist activity. . . . The plain text of this statute appears to be unambiguous: the Flatow Amendment does not on its face create a cause *of action against foreign states.*

Finally, the court noted, § 626(c) did not amend the Flatow Amendment; it amended only the jurisdictional provision. In vacating the original default judgment, the district court held, among other things, that it had lacked subject matter jurisdiction over the claims at the time the judgment was entered. The district court also held that § 626(c) could not be applied retroactively and that prior to § 626(c)'s amendment to FSIA in November 2001, plaintiffs could not prove all the elements required to meet the 1996 Anti-Terrorism Act's exception to Iran's sovereign immunity. In particular, Iran was not designated as a state sponsor of terrorism at the time of the 1979–1981 hostage taking or as

a result of that hostage taking. The exception to foreign sovereign immunity created by the 1996 Antiterrorism Act, 28 U.S.C. § 1605(a)(7), specifically states:

> . . . the court shall decline to hear a claim under this paragraph-(A) if the foreign state was not designated as a state sponsor of terrorism under [other specific federal statutes] at the time the act occurred, unless later so designated as a result of such act.

The district court commented on the relationship between Congress and the executive in this case as set forth below.

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* * * *

Lest this Court's decision be viewed as denying plaintiffs a remedy for the horrible wrongs they have suffered simply because Congress failed to use the proper choice of words, it is important to reiterate the values that are served by an abrogation doctrine that requires Congress to make its intent clear. The spheres of power of our co-equal branches of government can at times overlap. *See Springer v. Philippine Islands*, 277 U.S. 189, 209, 48 S. Ct. 480, 485, 72 L. Ed. 845 (1928) (dissenting opinion) ("the great ordinances of the Constitution do not establish and divide fields of black and white"). When such overlap occurs, and the wills of two branches are in conflict, the Constitution sets forth the rules for deciding which branch gets to trump the will of the other. In this case, by virtue of his power to direct the foreign affairs of this country, the President clearly has the authority to enter into international agreements. Congress, however, clearly has the corresponding right to abrogate the agreement reached by the President if it so wishes. Because of the respect owed to each co-equal branch of government, the courts must require that Congress make its intent clear, either by legislating unambiguously or accompanying ambiguous statutes with clear expressions of intent. Any other rule would allow the courts, by inference and interpretation, to impermissibly assume the legislative role.

Furthermore, while the power of Congress to legislate substantive law through riders attached to appropriations bills

and thereby bypass the usual process of development of law is established, this case exemplifies the difficulty faced by a court when interpreting the intent of Congress in passing such riders. *See, e.g., Robertson*, 503 U.S. at 440 ("Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly."); *United States v. Will*, 449 U.S. 200, 222, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980). Three of the four statutes at issue in this case, the Flatow Amendment, Subsection 626(c), and Section 208, were passed as appropriations riders with minimal legislative history to explain their purpose and relation to each other. When faced with such sparse explanation of statutory text, the Court must be even more vigilant in its refusal to draw inferences, even desirable inferences, that would fill in the gaps in congressional logic.

In the end, plaintiffs cite the text and legislative history of each of these statutes less as statements of the law than as signs that "Congress has sided with plaintiffs" and "does not want the State Department to prevail." It is unclear how plaintiffs are able to discern the clear intent of Congress when subsection 626(c) was not drafted until after H.R. 2500 had gone to conference, was never discussed in committee, was never subjected to floor debate, and the Conference Report offers only the most opaque reference to this case without ever explaining precisely what the statute purports to do, or why. Similarly, the explanation of subsection 626(c) found in the legislative history of Section 208's technical amendment, was also created in conference, and nowhere does it express a recognition of the obligations of this country under the Algiers Accords, or that Congress meant to eliminate those obligations. In the final analysis, the questions presented to this Court must be resolved by examining the text and legislative history of the relevant statutes, "not by psychoanalyzing those who enacted [them]." *Carter v. United States*, 530 U.S. 255, 271, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000). None of the statutes invoked by plaintiffs contain the language that Supreme Court precedent of very long-standing requires in order for plaintiffs to prevail. Such straightforward legislation would be simple enough to draft . . . but by the same token, by virtue of its clarity of purpose, may be difficult to enact. In light of Congress' failure

to express a clear intent to abrogate the Algiers Accords, this Court can not interpret these ambiguous statutes to create a cause of action for plaintiffs against Iran. Absent such plain, straightforward statutory language that expressly creates a cause of action for plaintiffs or reflects a clear intent to abrogate the Algiers Accords, this Court has no choice but to abide by and uphold the commitments that the United States made to the Islamic Republic of Iran in order to secure the freedom of the plaintiff hostages in 1981.

* * * *

(2) Weinstein v. Islamic Republic of Iran

A U.S. citizen was killed in the terrorist suicide bombing of the Number 18 Egged passenger bus in Jerusalem, Israel on February 25, 1996. His family members and the administrators of his estate brought a wrongful death action against Iran, its intelligence service, and senior officials of the Iranian government, pursuant to FSIA's antiterrorism provisions. Following defendants' default, the district court found that it had both subject matter and personal jurisdiction, that defendants were liable for the victim's death, and that plaintiffs were entitled to damages for loss of accretions to the estate, for the victim's pain and suffering, and for solatium as well as substantial punitive damages. Under the FSIA, the court said, a foreign state may be liable when there is injury from a terrorist act, that act was perpetrated by the designated state or an agent receiving material support from the designated state, provision of support was an act authorized by that foreign state, that state has been designated as one providing material support to terrorism, either victim or plaintiff was a U.S. national at the time of the terrorist act, and similar conduct by the United States, its agents, officials or employees within the United States would be actionable. *Weinstein v. The Islamic Republic of Iran*, 184 F. Supp. 2d 13 (D.D.C. 2002).

(3) Stethem v. Islamic Republic of Iran

In a case arising out of the hijacking of TransWorld Airlines ("TWA") Flight No. 847 in 1985, the family of a Navy petty officer murdered during the incident, and surviving Navy and Army personnel who had been aboard the same flight, brought wrongful death and personal injury actions against the Islamic Republic of Iran and its intelligence service, the Ministry of Information and Security ("MOIS"), alleging that defendants had been ultimately responsible for the hijacking and for the accompanying beatings and torture. Following defendants' default, the district court held that it had subject matter jurisdiction under the FSIA's terrorism exception, that defendants were subject to liability under the FSIA, and that plaintiffs were entitled to substantial compensatory and punitive damages. *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78 (D.D.C. 2002).

The court noted that a number of suits had previously and successfully been brought against state sponsors of terrorism, citing *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 20 (D.D.C. 2002); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 133–134 (D.D.C. 2001); and *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 32–33 (D.D.C. 2001). Section 1605(a)(7), it noted, imposes two preconditions upon the exercise of subject matter jurisdiction by district courts over such states: the foreign state must have been designated a state sponsor of terrorism at the time the acts occurred, unless later so designated as a result of such act, and a plaintiff (either claimant or victim) must have been a U.S. citizen at the time of the incident. Both of these requirements were satisfied in the case before the court. In addition, the alleged acts of unlawful detention and torture, and in the case of Robert Stethem, his summary execution, "unequivocally beget claims eligible for relief under section 1605(a)(7)." Finally, the court held, the evidence conclusively established that the Islamic Republic of Iran and its MOIS provided "material support or resources" to Hizballah, and that Hizballah and its co-conspirator Amal were the perpetrators of the acts in question.

(4) Ungar v. Islamic Republic of Iran

In *Ungar v. the Islamic Republic of Iran*, 211 F. Supp. 2d 91 (D.D.C. 2002), the district court ruled that the defendants (the Islamic Republic of Iran, the Iranian Ministry of Information and Security, and three Iranian government officials) could not be held liable for murders committed by members of HAMAS, a terrorist group to which they provided substantial support. Despite substantial evidence that defendants had given money and weapons to HAMAS and trained some of its members in order to encourage terrorist activities, that "sponsorship" was by itself insufficient to invoke jurisdiction under the terrorism exception to the FSIA. The court noted that, to satisfy § 1605(a)(7), a plaintiff need not establish that the material support or resources provided by a foreign state for a terrorist act contributed directly to the act from which his claim arises. The statute provides jurisdiction only for suits "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 . . . for such an act if such act or provision of material support is engaged in by an official, employee or agent" of a state sponsor of terrorism acting in their official capacity. Because plaintiffs had failed to establish a legally sufficient evidentiary basis for a reasonable jury to find that defendants' acts of the defendants were a necessary condition or "but for" cause of the deaths in question, however, defendants could not be held liable for murders committed by the terrorist group on either aiding-and-abetting or civil-conspiracy theory.

(5) Cronin v. Islamic Republic of Iran

In *Cronin v. The Islamic Republic of Iran*, 238 F. Supp. 2d 222 (D.D.C. 2002), the court entered a default judgment and awarded compensatory damages in the amount of $1.2 million and punitive damages in the amount of $300 million, in favor of an American student who had been abducted, beaten and held hostage by members of Amal, Islamic Amal, and Hizbollah terrorist groups in Beiruit. The excerpts

below provide the court's view with respect to its jurisdiction over Iran and its Ministry of Information and Security under § 1607(a), including its conclusion, in direct contradiction to Roeder, *supra*, A.6.d.(1), that the Flatow Amendment "does provide victims of state-sponsored acts of terrorism with a cause of action against the culpable foreign state." Footnotes have been omitted.

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. . . As this Court explained in *Flatow*, "[a]lthough [section 1605(a)(7)] created a forum competent to adjudicate claims arising from offenses of this nature, serious issues remained, in particular, the causes of action available to plaintiffs." *Flatow*, 999 F. Supp. at 12. . . . To create a cause of action for victims of state-sponsored terrorist acts, Congress passed an amendment to section 1605(a)(7) entitled "Civil Liability for Acts of State Sponsored Terrorism." Pub.L. No. 104–208, § 589, 110 Stat. 3009 (1996) (codified at 28 U.S.C. § 1605(a)(7) note). This provision, commonly referred to as the "Flatow Amendment," after a victim of a bus bombing named Alisa Flatow, provides that "[a]n 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 court of the United States may maintain jurisdiction under section 1605(a)(7)[.]" 28 U.S.C. § 1605(a)(7) note. The Flatow Amendment thus clearly establishes a cause of action against an "official, employee, or "agent" of a foreign state, such as the MOIS, that commits or causes another to commit a terrorist act. It is not as clear from the text of the Flatow Amendment, however, that victims of state-sponsored terrorist acts also have a cause of action against the foreign state itself. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87 (D.C. Cir. 2002) (recognizing that "the amendment does not list 'foreign states' among the parties against whom such an action may be brought.").

After carefully reviewing the FSIA, the Court holds that the Flatow Amendment does provide victims of state-sponsored acts

of terrorism with a cause of action against the culpable foreign state. There are three reasons why the Court reaches this conclusion. First, the text of the Flatow Amendment suggests, although admittedly does not explicitly state, that a cause of action exists against foreign states proper. Before addressing the text of the Flatow Amendment, however, it is important to recognize that the provision must be read in conjunction with 28 U.S.C. § 1605(a)(7). *Flatow*, 999 F. Supp. at 13 (noting that the Flatow Amendment "should be considered to relate back to the enactment of 28 U.S.C. § 1605(a)(7) as if they had been enacted as one provision, and the two provisions should be construed together and in reference to one another."); *Id.* at 12 (observing that "[t]he Flatow Amendment is apparently an independent pronouncement of law, yet it has been published as a note to 28 U.S.C. § 1605(a)(7), and requires several references to [that provision] to reach even a preliminary interpretation."). "The operative language of 28 U.S.C. § 1605(a)(7) parallels the definition of respondeat superior: an employer is liable in some cases for damages 'proximately resulting from acts of [an] employee done within [the] scope of his employment in the employer's service.'" *Flatow*, 999 F. Supp. at 26 (footnote omitted). Thus, under 28 U.S.C. § 1605(a)(7), the sovereign immunity of a foreign state will be abrogated if its "official, employee, or agent" provides material resources to the entity that commits the terrorist act. The Flatow Amendment likewise provides that an "official, employee, or agent" of a foreign state shall be liable if their actions were taken "while acting within the scope of his or her office, employment, or agency[.]" 28 U.S.C. § 1605(a)(7) note. In light of the identical language used in both statutory provisions, the Court finds that the respondeat superior implications of section 1605(a)(7) are equally applicable to the Flatow Amendment. Thus, in *Flatow*, the Court opined that "[t]he state sponsored terrorism exception to immunity and the Flatow Amendment similarly employ the principles of *respondeat superior* and command responsibility to create both subject matter jurisdiction and a federal cause of action." *Flatow*, 999 F. Supp. at 26. Moreover, by referring to officials, employees, and agents of foreign states, the Flatow Amendment makes clear that they can, in addition to the foreign state itself, be held liable for providing

material support to groups that perform terrorist acts. *See*, *e.g.*, *Flatow*, 999 F. Supp. at 24–25 (noting that the Flatow Amendment "overrides the common law doctrine of head of state immunity[.]"). When viewed in this light, it becomes clear that the omission of "foreign state" from the Flatow Amendment is the beginning, rather than the end, of the inquiry. It also shows that to interpret the text of the Flatow Amendment as denying a cause of action against the foreign state itself would turn the scheme of § 1605(a)(7) on its head. Instead of using the acts of officials, employees, and agents to support liability against the foreign state, the same language would be used in the Flatow Amendment to deny victims of state-sponsored terrorism a cause of action against the responsible foreign state.

Second, the legislative history of 28 U.S.C. § 1605(a)(7) and the Flatow Amendment support the conclusion that victims of state-sponsored acts of terrorism have a cause of action against the foreign state itself. "The stated purpose[s] of the Antiterrorism Act [are] to deter terrorist acts against U.S. nationals by foreign sovereigns or their agents and to provide for justice for victims of such terrorism." *Elahi*, 124 F. Supp. 2d at 106 (citing 110 Stat. 1214 (1996)). *See also Flatow*, 999 F. Supp. at 12–13 ("The brief explanation of the Flatow Amendment's purpose in the House Conference Report explicitly states that it was intended to increase the measure of damages available in suits under 28 U.S.C. § 1605(a)(7).") (citing H.R. Conf. Rep. 863, 104th CONG, 1996). These stated intentions would both be thwarted by construing the Flatow Amendment in a manner that precludes victims of terrorism from bringing suit against the responsible foreign states. At the same time, the purposes of the legislation would clearly be advanced by victims having a cause of action against the responsible foreign state. Indeed, to construe the Flatow Amendment as not conferring a private cause of action against foreign states would mean that what Congress gave with one hand in section 1605(a)(7) it immediately took away with the other in the Flatow Amendment.

Finally, relevant statutory provisions enacted after the Flatow Amendment also support the conclusion that it gives victims of state-sponsored acts of terrorism a cause of action against the responsible foreign state. For example, the Victims of Trafficking

and Violence Protection Act of 2000 ("Victims Protection Act") provides a mechanism by which successful plaintiffs can recover their damage awards against foreign states and their agents from the United States government. P.L. No. 106–386, 114 Stat. 1464 (2000). It is inconceivable that Congress would enable plaintiffs who obtained judgments against foreign states like Iran to recover the damage awards from the United States if the plaintiffs did not have a cause of action against the foreign state in the first place. Moreover, the legislative history of the Victims Protection Act indicates that Congress presumes the 1996 changes to the FSIA confers a private right of action against foreign states. *See*, *e.g.*, H.R. Conf. Rep. 939, 106th CONG, 2000 (stating that the 1996 amendments allowed "American citizens injured or killed in acts of terrorism (or their survivors) to bring a lawsuit against the terrorist state responsible for that act."); 146 Cong. Rec. S10164–02 (stating that the 1996 amendments "gave American victims of state-sponsored terrorism the right to sue the responsible state."). In addition, Congress amended 28 U.S.C. § 1606 in 1998 to permit victims to recover punitive damages against foreign states in actions brought pursuant to § 1605(a)(7). P.L. 105–277, 112 Stat. 2681–491 (1998) ("[A] foreign state except an agency or instrumentality thereof shall not be liable for punitive damages, except any action under section 1605(a)(7)[.]"). It seems highly unlikely that Congress would amend § 1606 to specifically permit punitive damage awards against foreign states under § 1605(a)(7) if a cause of action did not exist against those states. Furthermore, Congress repealed the amendment to § 1606 in 2000 after plaintiffs had recovered substantial punitive damage awards against foreign states like Iran. *Elahi*, 124 F. Supp. 2d at 113–14 n. 17 (citing P.L. No. 106–386, § 2002(f)(2)). It is even more implausible that Congress would amend that provision a second time by eliminating punitive damage awards against foreign states if victims did not have a cause of action against those foreign states at all.

In holding that victims of state-sponsored terrorist attacks have a cause of action against the culpable foreign state under the FSIA, this Court joins virtually every district judge in this circuit who has addressed the issue. *See, e.g., Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260 (D.D.C.2002) (Friedman, J.); *Daliberti v.*

Republic of Iraq, 146 F. Supp. 2d 19 (D.D.C.2001) (Oberdorfer, J.) *Elahi*, 124 F. Supp. 2d at 106 (Green, J.); *Higgins v. Islamic Republic of Iran*, Civ. A. No. 1:99cv00377, 2000 WL 33674311 (D.D.C. 2000) (Kollar-Kotelly, J.); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998) (Jackson, J.). *But see Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 171–73 (D.D.C. 2002) (Sullivan, J.).

* * * *

(6) Price v. Socialist People's Libyan Jamahiriya

Two American citizens brought suit under the FSIA's "terrorism" exception against the state of Libya for alleged torture and hostage taking. The Court of Appeals for the District of Columbia held that their allegations that they had been incarcerated by Libya for the purpose of demonstrating support of the Iran-U.S. Embassy hostage incident were insufficient to satisfy the standard for "hostage taking" under § 1605(a)(7), and their allegations that they had been "kicked, clubbed and beaten" by prison guards while jailed awaiting trial in Libya were insufficient to qualify as "torture" or to bring the case within the statutory exceptions to foreign sovereign immunity. The court also held, as a matter of first impression, that Libya, as a foreign state, is not a "person" within the meaning of the Due Process Clause and therefore that the Constitution imposes no limitation on the exercise of personal jurisdiction by the federal courts over Libya. *Price v. Socialist People's Libyan Jamahiriya*, 294 F.3d 82 (D.D.C. 2002).

7. Effect of Tax Treaty under FSIA

In 2001, in *Komet, Inc. v. Republic of Finland*, Civil Action No. 99–6080 (D.N.J.), the United States filed an *amicus* brief in the District Court for New Jersey in support of a motion by the government of Finland to vacate a default judgment requiring it to refund allegedly excessive income tax payments, on the ground that Finland had not waived

sovereign immunity and was immune from suit under the FSIA. *See* discussion and excerpts from the United States *amicus* brief in *Digest 2001* at 485–488. In February 2002, the district court granted Finland's motion, 2002 U.S. Dist. LEXIS 2922 (D.N.J.), finding that in the absence of any applicable exception under the FSIA it lacked subject matter jurisdiction to enter the default judgment.

8. Collection of Judgments

a. Jung Tang v. Chinese Cultural Center

On May 8, 2002, the United States submitted a Statement of Interest in *Jung Tang v. Chinese Cultural Center*, No. KC 028356, a civil action pending on appeal before the Superior Court of the State of California, County of Los Angeles. The suit involved a claim for damages arising from the alleged negligence of the Chinese Cultural Center ("CCC") in Los Angeles, which caused plaintiff to slip and fall on its premises. The CCC is an integral part of the Taipei Economic and Cultural Representative Office in the United States ("TECRO") (formerly the Coordination Council for North American Affairs or "CCNAA"), which, as explained in the U.S. Statement of Interest, is "not an agency or instrumentality" but instead "considered part of a 'foreign state' " for FSIA purposes. CCC did not appear in or defend the action, and a default judgment was entered against it in the amount of $462,279. Plaintiff filed an application for a writ of execution for the amount of the judgment, and in late 2001 a levy was placed on CCC's bank account. CCC moved to have the default judgment set aside and the levy vacated, claiming immunity under the FSIA as well as under the Agreement on Privileges, Exemptions, and Immunities Between the American Institute in Taiwan and the Coordination Council for North American Affairs. On February 5, 2002, in a preliminary hearing, the court declined to do so, finding that the CCC is an "instrumentality" of a foreign state, and was not immune

from personal injury lawsuits under the FSIA because the AIT-TECRO Agreement must be interpreted consistently with the FSIA and the International Organizations Immunities Act ("IOIA"), and cannot provide more immunity than the FSIA or the IOIA.

The U.S. Statement of Interest asserted that CCC's bank account is immune from attachment under the FSIA as well as pursuant to the Taiwan Relations Act ("TRA") of 1979, 22 U.S.C. §§ 3301–3316, as set forth in the excerpts below.

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

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* * * *

For purposes of the FSIA, TECRO/CCC is not an agency or instrumentality of Taiwan. Instead, it is considered part of the "foreign state", *i.e.*, Taiwan. As a "foreign state," the FSIA only permits the attachment of TECRO/CCC's bank account if it was used for a commercial activity. TECRO/CCC's bank accounts are not used for a commercial activity as a matter of law because TECRO/CCC performs functions similar to a diplomatic or consular mission.

There is another reason that the Court should vacate the levy on CCC's bank account: the AIT-TECRO Agreement, entered into pursuant to specific congressional authorization in the TRA, provides that TECRO's bank accounts are immune from attachment. The TRA was passed in 1979, and the AIT-TECRO Agreement was entered into in 1980, and therefore, they represent subsequent federal law that supercede the FSIA to the extent of any conflict. Therefore, if the Court disagrees with the United States and finds that the FSIA otherwise would permit the attachment of CCC's account, the TRA and the AIT-TECRO Agreement must still be enforced both as a matter of federal law and to avoid a breach of the reciprocal commitments in the AIT-TECRO Agreement.

* * * *

. . . Although TECRO/CCC is not a diplomatic or consular mission as a consequence of the fact that there is no official relationship between the United States and Taiwan, TECRO performs

functions similar to a diplomatic or consular mission for purposes of the United States' unofficial relationship with Taiwan. In addition, the TRA requires that TECRO be *treated* as a diplomatic or consular mission under the Foreign Missions Act as well as other statutes. *See* 22 U.S.C. § 3303(b)(1). Accordingly, the State Department has a duty to protect the proper functioning of TECRO/CCC, and thus to assist in the recognition of the privileges and immunities provided to it by the AIT-TECRO Agreement.

* * * *

Pursuant to the authority provided by the TRA, on October 2, 1980, CCNAA and AIT concluded the AIT-TECRO Agreement. The AIT-TECRO Agreement provides privileges and immunities to both entities similar to that enjoyed by certain foreign missions and their personnel and certain public international organizations and their personnel. For example, the AIT-TECRO Agreement provides that TECRO and AIT's archives and documents are inviolable, *see* AIT-TECRO Agreement art. 5(c), their real property is exempt from central and local taxation, *see id.* art. 5(d), and their personnel acting in an official capacity are immune from suit, *see id.* art. 5(e). Relevant to this case, Article 5(c) of the Agreement states:

> The property and assets of [both the American Institute in Taiwan and the CCNAA while in the party's territory], and any successor organization thereto, wherever located and by whomsoever held, shall be immune from forced entry, search, attachment, execution, requisition, expropriation or any other form of seizure or confiscation, unless such immunity be expressly waived. . . .

Id. art. 5(c).

* * * *

I. THE CHINESE CULTURE CENTER IS AN INTEGRAL PART OF TECRO THAT PERFORMS FUNCTIONS SIMILAR TO A DIPLOMATIC OR CONSULAR MISSION.

Even in the absence of diplomatic relations between the United States and Taiwan, courts have determined that TECRO performs functions similar to a diplomatic or consular mission. *See Taiwan v. United States Dist. Ct. for the N. Dist. of Cal.*, 128 F.3d 712, 714 (9th Cir. 1997) (recognizing that TECRO "performs functions similar to the functions performed by embassies of countries with whom the United States maintains diplomatic relations"); *Dupont Circle Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 530 A.2d 1163, 1170–72 (D.C. Ct. App. 1987) (holding that pursuant to the TRA, TECRO must be treated as a foreign mission). *See generally Sun v. Taiwan*, 201 F.3d 1105 (9th Cir.), *cert. denied*, 531 U.S. 979 (2000). Notably, courts have also determined that AIT, TECRO's counterpart entity, performs functions similar to a diplomatic or consular mission. *See Wood ex rel. U.S. v. American Inst. in Taiwan*, 286 F.3d 526, No. 01–5092, 2002 WL 553839, at *5 (D.C. Cir. Apr. 16, 2002) ("Put simply, though not an embassy, the Institute functions like one.").

The AIT-TECRO Agreement provides that TECRO could "establish branch offices in eight cities within the United States and such other additional localities as may be agreed upon by the counterpart organizations." AIT-TECRO Agreement art. 1. CCC is one of those offices. The record demonstrates the following.

CCC is one of the branch offices of TECRO. *See* Dec. 11, 2001 Aff. of Ding-Yuan Wang, ¶ 4; Exhs. B, E, F to Def.'s Req. for Judicial Notice of Jan. 3, 2001. CCC's full name is the Chinese Culture Center of the Taipei Economic and Cultural Office in Los Angeles. *See* Exhs. B, D to Def.'s Req. for Judicial Notice of Jan. 3, 2001. In addition, CCC's real property is owned by TECRO. *See* Exh. H to Def.'s Req. for Judicial Notice of Jan. 3, 2001. The Director and Deputy Director of CCC are employed by TECRO and are officials of Taiwan. *See* Dec. 11, 2001 Aff. of Ding-Yuan Wang, ¶ 3; Dec. 20, 2001 Aff. of Jason Yuan, ¶ 6. CCC does not perform functions for profit in the United States. *See* Dec. 11,

2001 Aff. of Ding-Yuan Wang, ¶ 9. Finally, CCC, pursuant to Article 5(d) of the AIT-TECRO Agreement and with the assistance of AIT, was granted a real property tax exemption under California law. *See* Exh. C to Dec. 20, 2001 Aff. of Jason Yuan (letter from County of Los Angeles to CCC informing CCC that its property was approved for "a Consular Exemption").

CCC is an integral part of TECRO, and like TECRO, performs functions similar to a diplomatic or consular mission. It is for this reason that the AIT-TECRO Agreement provides the same privileges and immunities to CCC, including immunity from attachment for its assets. *See* AIT-TECRO Agreement art. 5(c).

II. THE FSIA PROHIBITS ATTACHMENT OF TECRO/CCC'S BANK ACCOUNT.

As a general matter, the FSIA provides that "the property in the United States of a foreign state shall be immune from *attachment*[,] arrest and execution except as provided in section 1610 and 1611 of this chapter." *See* 28 U.S.C. § 1609 (emphasis added). Sections 1610 and 1611 provide a number of exceptions to this general rule, some of which apply only to agencies and instrumentalities of foreign states and not foreign states themselves. *Compare id.* § 1610(a) (applying to foreign states as defined by 28 U.S.C. § 1603(a)), *with id.* § 1610(b) (applying only to agencies and instrumentalities of foreign states). Therefore, in order to determine whether the FSIA by its own terms would permit attachment of TECRO/CCC's bank account, the first inquiry is whether TECRO/CCC is the foreign state, *i.e.*, Taiwan, or an agency or instrumentality of Taiwan for purposes of the FSIA.

A. TECRO/CCC is not an Agency or Instrumentality of Taiwan For Purposes of the FSIA.

Under the FSIA, an agency or instrumentality is defined as:

> [A]ny 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. 28 U.S.C. § 1603(b).

While not dismissing an inquiry into the legal and structural characteristics of an entity for purposes of whether it is an agency or instrumentality, courts have stressed that entities that perform inherently governmental functions such as embassies and consulates presumptively must be considered part of a foreign state and not an agency or instrumentality. *See Underwood v. United Republic of Tanz.*, No. 94–902, 1995 WL 46383, at *2 (D.D.C. Jan. 27, 1995); *Berdakin v. Consulado de law Republica de El Sal.*, 912 F. Supp. 458, 461 (C.D. Cal. 1995) (citing *Gerritsen v. Hurtado*, 819 F.2d 1511, 1517 (9th Cir. 1987)); *Gray v. Permanent Mission of People's Republic of Congo to the U.N.*, 443 F. Supp. 816, 820 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978) (unpublished mem.); *Segni v. Commercial Office of Spain*, 650 F. Supp. 1040, 1042 (N.D. Ill. 1986); *2 Tudor City Place Assocs. v. Libyan Arab Republic Mission to the U.N.*, 121 Misc. 2d 945, 946–47 (N.Y. Civ. Ct. 1983).

For example, the *Underwood* court held that, as a matter of law, embassies are not agencies or instrumentalities of foreign states for purposes of FSIA because "[t]he functions of an embassy are so integrally related to the core functions of government that it qualifies as part of the foreign state . . . regardless of whether the embassy has a separate name and some power to conduct its own affairs." 1995 WL 46383, at *2. Under this rationale, TECRO/CCC is not an agency or instrumentality of Taiwan because of the functions that it performs.

In addition, the D.C. Circuit has held that "[TECRO] enjoys the same immunity under the FSIA as do other nations." *See Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 883 (D.C. Cir. 1988); *see also id.* (stating that TECRO "rather than being a subject or citizen of Taiwan, *is* Taiwan"). For all of these reasons, TECRO/CCC is properly considered Taiwan for purposes of the FSIA, rather than an agency or instrumentality of Taiwan.

B. The Bank Accounts of TECRO/CCC Are Not Used for a Commercial Activity as a Matter of Law.

Once it has been established that TECRO/CCC is not an agency or instrumentality of Taiwan for purpose of the FSIA, § 1610(a), and not § 1610(b), applies. Under § 1610(a), CCC's bank account can be attached only if certain criteria are satisfied, the threshold requirement being that property of a foreign state is attachable only if it is used for a commercial activity in the United States. *See* 28 U.S.C. § 1610(a). Section 1610(a) provides, in relevant part:

> The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, *used for a commercial activity in the United States*, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if [certain conditions are met].

Id. (emphasis added). Thus, the next inquiry is whether the property at issue—CCC's bank account—was used for a commercial activity.

Courts have held that as a matter of law bank accounts of diplomatic and consulate missions are not used for a commercial activity. *See Trans Commodities, Inc. v. Kazakhstan Trading House, S.A.*, No. 96–316, slip op. at 4 & n. 3 (D.D.C. Feb. 27, 1997); *Sales v. Republic of Uganda*, No. 90–3972, 1993 WL 437762, at *1 (S.D.N.Y. Oct. 23, 1993); *Liberian E. Timber Corp. v. Government of the Republic of Liber.*, 659 F. Supp. 606, 609–10 (D.D.C. 1987). *See generally* H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 (indicating that employment of diplomatic personnel is a governmental activity, not a commercial one). *But cf. Birch Shipping Corp. v. Embassy of the United Republic of Tanz.*, 507 F. Supp. 311, 312 (D.D.C. 1980).

The *Liberian* court explained that "the rule of thumb . . . to determine whether activity is of a commercial or public nature is if the activity is one in which a private person could engage, it is not entitled to immunity." 659 F. Supp. at 610 (citations and internal quotation marks omitted). The bank accounts at issue in

that case were utilized for the "maintenance of the full facilities of Liberia to perform its diplomatic and consular functions as the official representative of Liberia in the United States. . . ." *Id.* Thus, "[t]he essential character of the activity for which the funds in the accounts [were used was] undoubtedly of a public or governmental nature because only a governmental entity may use funds to perform the functions unique to an embassy." *Id.* Finally, the court declined to scrutinize the accounts to determine whether some of the funds might be used for incidental commercial activities, instead concluding that such a determination would be unduly intrusive and contrary to the purposes of sovereign immunity. *See id.*

Like diplomatic and consular bank accounts, real property used to house an embassy or consulate also is not considered to be used for a commercial activity. *See* H.R. Rep. No. 94–1487, 1976 U.S.C.C.A.N. at 6628 ("[E]mbassies and related buildings [cannot] be deemed to be property used for a commercial activity,"); *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 920 (D.C. Cir. 1987) (agreeing that "operation of a chancery is, by its *nature* . . . governmental, not commercial") (internal citation omitted); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 36–37 (3d Cir. 1985) (same); *United States v. County of Arlington*, 702 F.2d 485, 488 (4th Cir. 1983) (same); *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 22–23 (D.D.C. 1999) (holding that embassies and residences of diplomats support diplomatic relations, an inherently sovereign, and not commercial, activity); *S&S Mach. Co. v. Masinexport-import*, 802 F. Supp. 1109, 1111–12 (S.D.N.Y. 1992) (indicating that consulate building was not used for commercial activity because only a sovereign can operate a consulate).

Moreover, courts have generally held that "[t]he concept of commercial activity should be defined narrowly because sovereign immunity remains the rule rather than the exception, and because courts should be cautious when addressing areas that affect the affairs of foreign governments." *Liberian*, 659 F. Supp. at 610 (citation and internal quotation marks omitted).

Under § 1610(a), CCC's bank account is immune from attachment because it was used to support offices that perform

functions similar to those performed by a diplomatic or consular mission, which is not a commercial activity as a matter of law. The conclusion is that the FSIA, like the AIT-TECRO Agreement, does not permit the attachment of CCC's bank account.

III. EVEN IF THE FSIA PERMITTED THE ATTACHMENT OF CCC'S BANK ACCOUNT, THE TRA AND THE AIT-TECRO AGREEMENT DO NOT AND THEY MUST BE ENFORCED

As a preliminary matter, if the Court finds that there is a potential conflict between (1) the FSIA and (2) the TRA and the AIT-TECRO Agreement, the Court must attempt to harmonize these federal law provisions. *See United States v. Vasquez-Velasco*, 15 F.3d 833, 840 (9th Cir. 1994) (citing the Restatement (Third) of Foreign Relations Law § 114 (1987) as requiring that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law"). As explained above, there is no conflict between the FSIA and either the TRA or the AIT-TECRO Agreement. But to the extent that the Court believes that there is, the Court should attempt to harmonize them by looking to their respective texts and purposes. *See Rodriguez v. United States*, 480 U.S. 522, 524–25 (1987).

As a general matter, the legislative history of the FSIA indicates that the FSIA was not to be construed to affect diplomatic or consular immunity. *See* H.R. Rep. No. 1487, 1976 U.S.C.C.A.N. at 6610. More specifically, in passing the FSIA, Congress made clear that international agreements entered into *prior* to the FSIA's passage were to be applied in accordance with their terms. *See* 28 U.S.C. §§ 1604, 1609. This necessarily included a number of international agreements governing the privileges and immunities of both diplomatic or consular missions and public international organizations. *See*, *e.g.*, Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227 (Apr. 18, 1961); Convention on Privileges and Immunities of the U.N., 21 U.S.T. 1418, 1 U.N.T.S. 16 (done Feb. 13, 1946, entered into force for the United States on Apr. 29, 1970). Congress also wanted to ensure that the FSIA

be made subject to future agreements, but deleted as unnecessary a proposal to this effect. *See* H.R. Rep. No. 1487, 1976 U.S.C.C.A.N. at 6608. Congress recognized that regardless of an express provision, under established law, a later-enacted agreement would take precedence over an earlier statute. *See id.* In passing the FSIA, it is clear that Congress did not intend to allow the FSIA to interfere in any way with the immunities afforded to diplomatic or consular missions both before and after passage.

Subsequent to the FSIA's passage, Congress passed the TRA, which was intended "to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan" via the unique arrangement set forth in the statute. *See* 22 U.S.C. § 3301(a)(2); *id.* §§ 3301 *et seq.* It specifically authorized the President to extend to TECRO "such privileges and immunities . . . as may be necessary for the effective performance of [TECRO's] functions." *Id.* § 3309(c). After the AIT-TECRO Agreement was entered into and immunity from the attachment of its assets was extended to TECRO, it was submitted to the Congress in accordance with the TRA. *See* 22 U.S.C. § 3311(a). AIT-TECRO agreements are required by statute to be transmitted to Congress in the same manner as international agreements by the United States. *See id.*

In attempting to harmonize the FSIA and the TRA/AIT-TECRO Agreement, it should also be recognized that the language of the TRA and the AIT-TECRO Agreement are quite specific in prohibiting the attachment of TECRO's property, whereas the language of the FSIA is general. *See United States v. Shewmaker*, 936 F.2d 1124, 1127 (10th Cir. 1991) (citing *Townsend v. Little*, 109 U.S. 504, 512 (1883)). For all of these reasons, the Court should harmonize any perceived difference between the FSIA and the TRA/AIT-TECRO Agreement to prohibit the attachment of CCC's bank account, as both Congress and the President intended.

If there remains any possibility that (1) the FSIA, passed in 1976 and, (2) the TRA, passed in 1979, and the AIT-TECRO Agreement, signed in 1980, cannot be harmonized, the provisions of the TRA and the AIT-TECRO Agreement still must be applied in accordance with their terms and, as such, to prevent the

attachment of CCC's bank account. This is because where provisions in two acts are in irreconcilable conflict, the later one constitutes an implied repeal of the earlier one to the extent of the conflict. *See Posadas v. National City Bank of N.Y.*, 296 U.S. 497, 503 (1936). In general, an international agreement entered into pursuant to congressional authority also implicitly repeals inconsistent earlier legislation to the extent of a conflict. *See*, *e.g.*, Restatement (Third) of Foreign Relations Law, § 115 cmt. c (1987); *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981). Although the AIT-TECRO Agreement is not an international agreement, the TRA requires the AIT-TECRO Agreement to be treated as such. *See* 22 U.S.C. §§ 3303, 3305(b), 3311(a). *See generally Taiwan*, 128 F.3d at 717 (giving effect to the AIT-TECRO Agreement). . . .

* * * *

b. Flatow v. Islamic Republic of Iran

On October 23, 2002, the U.S. Court of Appeals for the Ninth Circuit, in *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002), affirmed a district court decision to grant a bank's motion for release of the proceeds of sale of certain property, which was being held subject to a lien created by a writ of execution. In this case, Stephen Flatow, the father of an American citizen killed in 1995 in a terrorist attack in Israel, had filed a wrongful-death action against the Islamic Republic of Iran and various Iranian officials under the then newly-enacted terrorism exception to the FSIA, *see* A.6.d., *supra*. On March 11, 1998, the district court entered a default judgment against Iran in favor of Flatow in the amount of $247,513,220. *See Flatow v. Islamic Republic of Iran,* 999 F. Supp. 1 (D.D.C. 1998). Thereafter, Flatow registered his judgment with the District Court for the Southern District of California and obtained a writ of execution for $247,513,220 on property in Carlsbad, California, owned by California Land Holding Company, a wholly owned subsidiary of Bank Saderat Iran ("BSI"), an Iranian bank. Pursuant to

a consent order entered into between BSI and Flatow on October 1, 1999, the proceeds of sale of the property were held in an interest-bearing account subject to the lien created by the writ of execution.

The district court ultimately granted BSI's motion for release of the funds. It concluded that the "evidence Flatow presented was not sufficient to overcome the presumption that BSI is a juridical entity separate and apart from the Islamic Republic of Iran and therefore not subject to execution of the judgment against Iran," relying on the Supreme Court decision in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cub*a, 462 U.S. 611 (1983) ("*Bancec*"). *See* 308 F.3d 1065 at 1068. In affirming the district court's holding, the Ninth Circuit considered, *inter alia*, whether amendments to the FSIA abrogated the *Bancec* presumption. Excerpts below from the Ninth Circuit opinion provide its analysis of the issue, concluding that no such abrogation occurred.

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* * * *

In *Bancec*, the Supreme Court clearly stated that the FSIA does not govern substantive liability for sovereign states or their instrumentalities . . . The enumerated exceptions to the FSIA provide the exclusive source of subject matter jurisdiction over civil actions brought against foreign states . . . but the FSIA does not resolve questions of liability. Questions of liability are addressed by *Bancec*, which examines the circumstances under which a foreign entity can be held substantively liable for the foreign government's judgment debt. This distinction between liability and jurisdiction is crucial to our resolution of this case.

* * * *

We asked the United States to file an amicus curiae brief on the issue of whether amendments to the FSIA abrogate the *Bancec* presumption.

The Untied States took the position that the amendments to the FSIA did not alter the *Bancec* presumption because *Bancec* and the FSIA govern two separate questions of law: liability and jurisdiction. It is now clear to the panel that the district court was

correct in resolving this matter under the threshold *Bancec* liability inquiry.

* * * *

B. HEAD OF STATE IMMUNITY

1. *Wei Ye v. Jiang Zemin*

In the *Wei Ye v. Jiang Zemin* case adherents of the Falun Gong movement filed a class-action suit against Chinese President Jiang Zemin. In addition to challenging the legality of the method of service (*see* F.3.b. below), the United States urged dismissal of the claims against President Jiang on head of state immunity grounds. Below are excerpts from the Corrected United States' Motion to Vacate October 21, 2002, Order and Statement of Interest or, in the Alternative, Suggestion of Immunity.

The full texts of the U.S. motion and the letter of Mr. Taft mentioned in the excerpts below, are available at *www.state.gov/s/l/c8183.htm*.

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* * * *

a. President Jiang Enjoys Head of State Immunity

The United States has an additional interest in this action insofar as it involves the question of a head of state's immunity from the Court's jurisdiction. This interest arises from a determination by the Executive Branch of the U.S. Government, in its implementation of foreign policy and conduct of international relations, that permitting this action to proceed against President Jiang would be incompatible with the United States' foreign policy interests. The Court should give effect to this determination if it rejects the arguments set forth above.

The Legal Adviser of the Department of State has informed the Department of Justice that "[t]he Department of State recognizes and allows the immunity of President Jiang from this suit." (Letter from William H. Taft, IV to Robert D. McCallum, Jr. of Dec. 6,

2002 [copy attached at Tab E].) Under customary rules of international law recognized and applied in the United States, and pursuant to this Suggestion of Immunity, President Jiang, as the head of a foreign state, is immune from the Court's jurisdiction in this case. *See*, *e.g.*, *Leutwyler v. Queen Rania Al Abdullah*, No. 00 Civ. 5485, 2001 WL 893343, at *1 (S.D.N.Y. Aug. 8, 2001); *First Am. Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994), *aff'd* 79 F.3d 1145 (5th Cir. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994), *appeal dismissed*, No. 94–6026 (2d Cir. 1994).

The Supreme Court has mandated that the courts of the United States are bound by suggestions of immunity, such as this one, submitted by the Executive Branch. *See*, *e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35–36 (1945); *Ex parte Peru*, 318 U.S. 578, 588–589 (1943). In *Ex parte Peru*, the Supreme Court, without further review of the Executive Branch's determination regarding immunity, declared that the Executive Branch's suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that the retention of jurisdiction by the courts would jeopardize the conduct of foreign relations. *Ex parte Peru*, 318 U.S. at 589; *accord Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974). Accordingly, where, as here, immunity has been recognized by the Executive Branch and a suggestion of immunity is filed, it is the "court's duty" to surrender jurisdiction.[12] *Ex parte Peru*, 318

[12] The conclusive effect of the Executive Branch's suggestion of immunity in this case is not affected by enactment of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602, *et seq*. Prior to passage of the FSIA, the Executive Branch filed suggestions of immunity with respect to both heads of state and foreign states themselves. The FSIA transferred the determination of the immunity of foreign states from the Executive Branch to the courts. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610. The FSIA, however, did not alter Executive Branch authority to suggest head of state immunity for foreign leaders, or affect the binding nature of such suggestions of immunity. *See*, *e.g.*, *First Am. Corp.*, 948 F. Supp. at 1119; *Lafontant*, 844 F. Supp. at 132–33.

U.S. at 589; *accord Hoffman*, 324 U.S. at 35. Indeed, the courts of the United States have heeded the Supreme Court's direction regarding the binding nature of suggestions of immunity submitted by the Executive Branch.[13]

Judicial deference to the Executive Branch's suggestions of immunity is predicated on compelling considerations arising out of the conduct of our foreign relations. *Spacil*, 489 F.2d at 619. First, as the *Spacil* court explained:

> Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy.

Id. (*citing United States v. Lee*, 106 U.S. 196, 209 [1882]); *accord Ex parte Peru*, 318 U.S. at 588. Second, the Executive Branch possesses substantial institutional resources to pursue and extensive experience to conduct the country's foreign affairs. *See Spacil*, 489 F.2d at 619. By comparison, "the judiciary is particularly ill-equipped to second-guess" the Executive Branch's determinations affecting the country's interests. *Id.* Finally, and "[p]erhaps more importantly, in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves." *Id.*

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[13] *See*, *e.g.*, *Leutwyler*, 2001 WL 893343 at *1 (Executive Branch Suggestion of Immunity "is entitled to conclusive deference from the courts"); *First Am. Corp.*, 948 F. Supp. at 1119 (suggestion by Executive Branch of the United Arab Emirates' Sheikh Zayed's immunity determined conclusive and required dismissal of claims alleging fraud, conspiracy, and breach of fiduciary duty); *Alicog,* 860 F. Supp. at 382 (suggestion by Executive Branch of King Fahd's immunity as head of state of Saudi Arabia held to require dismissal of complaint against King Fahd for false imprisonment and abuse); *Lafontant*, 844 F. Supp. at 132–33 (suggestion by Executive Branch of Haitian President Aristide's immunity held binding on court and required dismissal of case alleging that President Aristide ordered murder of plaintiff's husband); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (suggestion of Prime Minister Thatcher's immunity conclusive in dismissing suit that alleged British complicity in U.S. air strikes against Libya), *aff'd in part and rev'd in part on other grounds*, 886 F.2d 438, 441 (D.C. Cir. 1989).

Thus, as a foreign head of state, and pursuant to the United states' suggestion of immunity, President Jiang is immune from the jurisdiction of this Court.[14]

b. Head-of-State Immunity Renders President Jiang Immune from Service of Process

The immunity of the person of a foreign head of state, i.e., his or her personal inviolability, is considered a core diplomatic immunity. As a leading treatise recognizes:

> Personal inviolability is of all the privileges and immunities of missions and diplomats the oldest established and the most universally recognized. . . . The inviolability of ambassadors is clearly established in the earliest European writings on diplomatic law and from the sixteenth century until the present one can find virtually no instances where a breach of a diplomat's inviolability was authorized or condoned by the Government which received him.

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[14] Contrary to Plaintiffs' assertion in paragraph 10 of their Complaint, no exception to the head of state immunity doctrine applies to this civil proceeding in a United States court. The Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, *United States accession*, Feb. 23, 1989, T.I.A.S. No. 1021, 78 U.N.T.S. 277, cited by Plaintiffs, provides no relevant exception to head-of-state immunity. Rather, that instrument concerns potential criminal prosecution for acts of genocide, and states that "[p]ersons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction . . . ." Genocide Convention, article VI. Plaintiffs also cite the Torture Victim Protection Act ("TVPA"), but the legislative history to that Act expressly states that "nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity. These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business." H.R. Rep. No. 102–367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88. In the end, the United States recognizes no applicable exception to head-of-state immunity in this case, and thus recognizes and allows President Jiang's immunity from it.

Lord Gore-Bush, *Satow's Guide to Diplomatic Practice* 120 (5th ed. 1979).[15] "When a head of state or government comes on an official visit to another country, he is generally given the same personal inviolability and immunities as . . . an accredited diplomat." *Restatement (Third) of Foreign Relations Law* § 464 reporters' note 14; *see also* Sir Arthur Watts, *The Legal Position in Int'l Law of Heads of State, Heads of Governments and Foreign Ministers*, 51–52 (1994) ("In determining the meaning of this 'inviolability' [for heads of state], it is natural to have regard to the equivalent inviolability which is enjoyed by foreign ambassadors—but always bearing in mind that a Head of State's position is even more demanding of respect and protection than is that of an ambassador"). The Vienna Convention on Diplomatic Relations provides full personal inviolability for diplomatic agents, stating simply 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.[16]

Persons who are "inviolable" may not be personally served with legal process. *E.g.*, *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980–81 (D.C. Cir. 1965) (holding that "the purposes of diplomatic immunity forbid service" of a summons addressed to the Republic of Tunisia on the Tunisian Ambassador to the United States).[17] As a leading commentator on diplomatic law states,

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[15] *Accord* B. Sen, *A Diplomat's Handbook of Int'l Law and Practice* 107 (3d ed. 1988) (it is "essential to ensure inviolability of the person of the ambassador in order to allow him to perform his functions without any hindrance from the government of the receiving state, its officials or even private persons").

[16] In 1978, Congress enacted the Diplomatic Relations Act, 22 U.S.C. § 254a *et seq.*, to implement the Vienna Convention.

[17] *See also*, *e.g.*, *Lafontant*, 844 F. Supp. at 130 (upon finding defendant enjoyed head-of-state immunity from action, a judgment "quashing service of process . . . and dismissing the action was promptly entered"); *Aidi v. Yaron*, 672 F. Supp. 516, 517 (D.D.C. 1987) (diplomat enjoying immunity from suit was entitled not only to dismissal of complaint, but also to have service of process quashed); *Vulcan Iron Works v. Polish Am. Mach. Corp.*, 472 F. Supp. 77, 78 (S.D.N.Y. 1979) (Vienna Convention and Diplomatic

"serving process on the diplomat . . . cannot be done by the authorities of the receiving State because of his inviolability." Eileen Denza, *Diplomatic Law* 265–66 (2d ed 1998).

* * * *

2. Rhanime v. Solomon

In 2002 the United States filed a Suggestion of Immunity in *Rhanime v. Solomon*, Civil Action No. 01–1479 (D.D.C.). The complaint in *Rhanime* alleged that H.E. Mohamed Benaissa, the Foreign Minster of the Kingdom of Morroco, entered into an agreement to injure the plaintiff through defamation. In light of the Suggestion and upon recognition of the applicability of the head of state immunity doctrine to foreign ministers, the district court dismissed the claims against Benaissa.

The full text of the U.S. Suggestion of Immunity in the *Rhanime* case is available at *www.state.gov/s/l/c8183.htm*.

C. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

1. *Ahmed v. Hoque*

In February 2002 the United States filed a Statement of Interest in *Ahmed v. Hoque*, No. 01 CIV 7224, U.S. District Court for the Southern District of New York, in which it set forth its view that defendants were entitled to diplomatic

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Relations Act provide protection from "the jurisdiction and compulsory process of this court"); *Greenspan v. Crosbie*, 1976 WL 841 at *6 (S.D.N.Y. Nov. 23, 1976) (recognizing that service on entity through immune officials "while on a visit to the United States is patently improper") (citing *Hellenic Lines*). *But cf. Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 306–09 (S.D.N.Y. 2001) (holding that, although president of Zimbabwe was immune from service in his own capacity, he could be served as agent for political party) (the United States disagrees with this ruling and is pursuing additional review).

immunity and that the claims against them should, accordingly, be dismissed. Defendant Abul Hasnat Mohammad Hoque was a Minister in the Permanent Mission of the People's Republic of the State of Bangladesh to the United Nations and defendant Sabiha Sadiq was his spouse. Plaintiff alleged that he had worked as a domestic servant in defendants' home, where he claims to have been subjected to abusive working conditions and to have suffered an injury after an altercation with defendant Mrs. Hoque. Plaintiff sought damages for claims including defendants' allegedly holding him in involuntary servitude in violation of the Thirteenth Amendment, federal statutes, international treaties and customary international law, and for failure to pay minimum wage under federal and state law. Relevant excerpts from the U.S. submission are reproduced below.

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

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"The questions of the diplomatic status enjoyed by a given defendant and the immunity to be accorded him are . . . questions where a determination of the Department of State is binding upon the court." *Arcaya v. Paez*, 145 F. Supp. 464, 467 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 958 (2d Cir. 1957). Thus, "[t]he courts are bound by a determination of the Department of State that an alien claiming diplomatic status is entitled to that status, since this is construed as a nonreviewable political decision." *United States v. Enger*, 472 F. Supp. 490, 506 n.19 (D.N.J. 1978) (citing *In re Baiz*, 135 U.S. 403 (1890); *Sullivan v. State of San Paulo*, 122 F.2d 355, 357–58 (2d Cir. 1941); *United States v. Coplon*, 84 F. Supp. 472, 475 (S.D.N.Y. 1949)). *See also Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984) ("courts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status"); *Carrera v. Carrera*, 174 F.2d 496, 497–98 (D.C. Cir. 1959) (same); *In the Matter of Terrence K.*, 135 A.D. 2d 857, 858 (2d Dep't 1987) (same for State Department certification of status of representative

of mission to United Nations); *Traore v. State*, 431 A.2d 96, 98 (Ct. App. Md. 1981) ("It is settled that the State Department's determinations concerning an individual's diplomatic status at a particular time should ordinarily be accepted by the courts"). *Compare Premier Steamship Corp. v. Embassy of Algeria*, 336 F. Supp. 507, 509 (S.D.N.Y. 1971) (letter from State Department to attorney containing general statement that embassy is entitled to immunity is not binding on the court); *United States ex rel. Casanova v. Fitzpatrick*, 214 F. Supp. 425, 434 (S.D.N.Y. 1963) (where State Department certified that the United States had not agreed to grant diplomatic immunity to petitioner under the Headquarters Agreement, certification was "evidential but not conclusive").

In this action, where the State Department has certified the United States' agreement that Mr. Hoque is entitled to the same immunity "as the United States accords to diplomatic envoys who are accredited to it," and that such immunity includes immunity for Mrs. Hoque as a household family member, these certifications are conclusive as to such status.

ARGUMENT

* * * *

The United States has entered into a number of treaties that establish its obligation to accord diplomatic immunity to Mr. Hoque, as a resident representative of Bangladesh to the United Nations, and to his wife, Mrs. Hoque. These treaties are the United Nations Charter, 59 Stat. 1031 (1945) (the "UN Charter"), the Headquarters Agreement, the Convention on the Privileges and Immunities of the United Nations ["General Convention"], and the Vienna Convention. These treaties have the same force of law as statutes, for "[u]nder our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence to differentiate between them." *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988) (citing U.S. Const., art. VI, cl.2).

* * * *

In this action, the treaties at issue are the UN Charter, the Headquarters Agreement, and the General Convention. These international agreements contain the fundamental provisions that have been construed and implemented for more than fifty years to realize the broad objectives set forth in the United Nations Charter. As demonstrated below, the United States and the international community have consistently interpreted and applied these provisions in the same way, and have agreed that these treaties provide the same level of immunity to representatives to the United Nations as the United States provides to diplomats accredited to the United States, as codified in the Vienna Convention.

As an initial matter, as explained in the House of Representatives Report that accompanied the Joint Resolution authorizing the President to bring into effect the Headquarters Agreement, the operation of the United Nations headquarters is inextricably linked with the question of immunity. H.R. Rep. No. 1093, 80th Cong., 1st Sess., at 8 (1947) ("1947 House Report"). Under Article 105 of the UN Charter, *inter alia*, representatives to the United Nations shall enjoy in all nations "such privileges and immunities as are necessary for the independent exercise of their functions in connections with the Organization." *Id.* (quoting UN Charter, art. 105). "The host nation, however, is under special responsibility to assure that the arrangements made suffice for the efficient functioning of the United Nations. The host nation also is in a special relationship in that it is more deeply involved domestically in the nature of the arrangements and the manner of their working." *Id.* The Headquarters Agreement sets forth the agreements on these matters between the United Nations and the United States as host country. *Id.*[7]

[7] Before the United States and the United Nations worked out the Headquarters Agreement, the level of privileges and immunities accorded to United Nations representatives and personnel was governed by the International Organizations Immunities Act, 22 U.S.C. §§ 288 *et seq.* ("IOIA"), which provides only functional immunity for representatives of international organizations. The IOIA was passed in December 1945 for the general purpose of defining the privileges and immunities of international organizations in the United States, several of which were already in operation

One of the special arrangements between the United States and the United Nations in the Headquarters Agreement is that certain classes of representatives of member states of the United Nations, namely, resident representatives, will be entitled in the United States "'to the same privileges and immunities' as are accorded to diplomatic envoys accredited to the United States, subject, however, to 'corresponding conditions and obligations.'" 1947 House Report, at 11. Thus, the House Report notes, "a limited group of the more important representatives to the United Nations *will receive the same diplomatic status as their colleagues in Washington who are accredited to the United States Government*." *Id.* (emphasis added). *See also* 1947 Senate Report, at 4 (same). As the House Report makes clear, while the UN Charter did not specify a requirement of diplomatic status for resident representatives of its members, in the Headquarters Agreement, "[t]he United States and the United Nations have come to an agreement that diplomatic status is the necessary formula here. . . . The premise of the agreement is that the sum total of the privileges necessarily approximates that of diplomatic status, and the committee accept this view." 1947 House Report, at 11–12.

The provision ultimately codified as Article V, section 15 in the Headquarters Agreement was thus always understood to provide diplomatic immunity to resident representatives of members

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at that time. 1947 Senate Report, at 3. While it was hoped that the IOIA would cover the requirements of the United Nations, *id.*, the functional immunity provided thereunder was apparently not sufficient to meet the needs of the United Nations. These needs are addressed by the Headquarters Agreement and the General Convention, both of which must be viewed as amending any inconsistent provisions in the IOIA with respect to the United Nations. *Id. See also* Letter from Ernest A. Gross, Legal Adviser, United States Department of State to Lawrence H. Smith, Chairman, Subcommittee No. 6 on International Organizations and International Law of the Committee on Foreign Affairs, April 28, 1948, *reprinted in* Committee on Foreign Affairs, *Structure of the United Nations and the Relations of the United States to the United Nations*, 80th Cong., 2d Sess., 509 (1948) ("1948 Legal Adviser Letter") (IOIA was enacted by United States on own initiative, and it was to be anticipated that, after gaining experience with United Nations' issues, the final arrangements for United Nations immunities might differ from those in the IOIA).

of the United Nations, as opposed to the more limited functional immunity set forth in the IOIA. In this context, the phrase "subject to corresponding conditions and obligations" found in Article V, section 15 only makes sense if it refers to corresponding conditions and obligations of other diplomats accredited to the United States. This understanding is confirmed in the 1948 letter from the Legal Adviser of the Department of State to a Congressional Subcommittee:

> The background in the negotiation of section 15 of the headquarters agreement indicates that the phrase "subject to corresponding conditions and obligations" was inserted by way of compromise to meet a desire on the part of the United States that persons covered by section 15 were not to receive privileges and immunities broader than those accorded to diplomatic envoys accredited to the President of the United States, and that like diplomatic envoys, such persons might be found personne non gratae and made subject to recall.

1948 Legal Adviser Letter, at 511. This understanding of the phrase "subject to corresponding conditions and obligations" was quoted with approval by the International Law Commission, a body of international legal experts commissioned by the United Nations, in a discussion of the practice of the United Nations concerning, among other things, the status, privileges, and immunities of representatives of its members. 1967 *International Law Commission Yearbook*, Vol. II, at 154, 177–78.

The history and interpretation of the General Convention further supports the understanding that, since entry into force of the Headquarters Agreement, resident member state representatives to the United Nations have been entitled to diplomatic immunities, subject only to corresponding conditions and obligations attendant on other diplomats. As discussed above (at 9), Article IV, section 11 of the General Convention extends diplomatic privileges and immunities to non-resident representatives to the United Nations. The legislative history accompanying this extension of privileges and immunities confirms that such immunities were already in

force with respect to resident representatives, such as Mr. Hoque, under Article V, section 15 of the Headquarters Agreement, and that the function of the General Convention was to extend these immunities to additional classes of representatives.

* * * *

The conferral of all of the benefits of the Vienna Convention upon permanent representatives to the United Nations was again confirmed with the passage of the Diplomatic Relations Act of 1978, Pub. L. No. 95–393, codified at 22 U.S.C. §§ 254a–254e. The Diplomatic Relations Act incorporated the Vienna Convention and repealed the prior statute on diplomatic immunity dating back to 1790, which had been codified at 22 U.S.C. §§ 252–54, and which had been viewed as granting full diplomatic immunity to a wider class of diplomats than those intended to be covered by the Vienna Convention. *See* S. Rep. No. 95–958, 95th Cong., 2nd Sess., at 1–2, *reprinted at* 1978 U.S.C.C.A.N. 1935, 1935–36 (1978) ("1978 Senate Report"). In a report accompanying the Diplomatic Relations Act, the Senate Committee on Foreign Relations noted that "by special statutes, the rights, privileges, and immunities accorded to diplomats attached to embassies in Washington are also enjoyed by the permanent representatives of country missions to the United Nations in New York. . . ." *Id.* at 3, 1978 U.S.C.C.A.N. at 1937. The Diplomatic Relations Act also expressly defined the term "mission" to include:

> missions within the Vienna Convention and any missions representing foreign governments, individually or collectively, which are extended the same privileges and immunities, pursuant to law, as are enjoyed by missions under the Vienna Convention

22 U.S.C. § 254a(3). This definition was intended to "make[] clear the intent that the United Nations . . . continue[s], as in the past, to be considered part of the diplomatic community for purposes of entitlement to privileges and immunities." 1978 Senate Report, at 4, 1978 U.S.C.C.A.N. at 1938. The Senate Committee specifically contrasted the inclusion of the United Nations in the

full scope of the Vienna Convention with the exclusion from the Vienna Convention of organizations covered by other, more limited statutory immunities, such as the functional immunity flowing from the IOIA. *Id.*

Finally, like the United States and the International Law Commission, the United Nations views the treaties at issue here as conferring diplomatic immunities upon representatives of its members consistent with those set forth in the Vienna Convention. This is explicitly stated with respect to Article V, section 15 of the Headquarters Agreement in the 1983 *United Nations Juridical Yearbook*:

> From the very beginning the United Nations took the position, in light of Article 105 of the Charter, that those representatives should enjoy the same privileges and immunities as are accorded to diplomatic envoys accredited to the Government of the United States.
>
> * * * *
>
> It follows from Article V, section 15, of the Headquarters Agreement that the relevant provisions of general international law on the question of privileges and immunities also apply to the resident representatives to the United Nations and their staffs. International law concerning this question is codified in the 1961 Vienna Convention on Diplomatic Relations.

Id. at 222. *See also* 1986 *United Nations Juridical Yearbook*, at 327 (reprint of letter from the United Nations to the deputy permanent representative of a member state confirming that the Vienna Convention is applicable to permanent missions to the United Nations by virtue of Art. V, sec. 15 of the Headquarters Agreement).

In addition, the United Nations attributes the same interpretation to Article IV, section 11 of the General Convention attributed by the United States, namely, that this also provides diplomatic immunity, extended to a larger class of people than those covered by the Headquarters Agreement. *See* 1976 *United*

Nations Juridical Yearbook, at 224–29. Indeed, the United Nations has explicitly rejected the notion that the immunity language of Article IV, section 11 is limited to the official functions of representatives to the United Nations, notwithstanding the use of the phrase "while exercising their functions and during their journey to and from the place of meeting . . .":

> In the view of the Secretary-General, to interpret those words so as to limit them to times when the person concerned is actually doing something as part of his functions as a representative, for example speaking in a United Nations meeting, leads to absurd and meaningless results, making such an interpretation wholly untenable. The only reasonable interpretation is the "broad" one, namely to regard the words concerned as describing the whole period during which the person involved discharges his responsibilities.

Id. at 228. The *Yearbook* further explains: "In other words, 'while exercising' means during the entire period of presence in the State. . . ." *Id.*

* * * *

In accordance with the above, courts in this district have uniformly declined to proceed with actions against representatives to the United Nations entitled to diplomatic immunity, particularly when the Department of State has certified that immunity should be accorded. *See Fireman's Ins. Co. v. Onwualia*, No. 94 Civ. 0095 (PKL), 1994 WL 706994, *3 (S.D.N.Y. Dec. 19, 1994); *York River House v. Pakistan Mission to the United Nations*, No. 90 Civ. 2071 (PNL), 1991 WL 206286, *1 (S.D.N.Y. Sept. 27, 1991); *Arcaya*, 145 F. Supp. at 468, 472–473. *See also Terrence K.*, 135 A.D. 2d at 858 (same result in New York State court); *767 Third Avenue*, 988 F.2d at 297–98; 302–03 (same provisions of United Nations' immunity in the UN Charter, Headquarters Agreement and General Convention that address immunity of representatives require the United States to accord United Nations mission with inviolability under the Vienna Convention). This Court should likewise decline to adjudicate plaintiff's claims.

II. Respecting Defendants' Diplomatic Immunities Does Not Present A Constitutional Issue

According the appropriate level of immunity to Mr. and Mrs. Hoque is consistent with customary norms of international law and does not present a constitutional issue. As an initial matter, the treaties at issue here do not conflict with the Constitution, international treaties, conventions, or customary international law. Nothing in the UN Charter, the Headquarters Agreement, the General Convention, or the Vienna Convention authorizes involuntary servitude, or any other practice forbidden by the Constitution. Moreover, even if any constitutional right were implicated, a guaranteed entitlement to a judicial remedy does not necessarily follow, particularly where there are other, equally important, principles at stake.

The diplomatic immunities provided by the Vienna Convention—made applicable to Mr. and Mrs. Hoque through Article V, sec. 15 of the Headquarters Agreement and Article IV, sec. 11 of the General Convention—have long been an integral component of customary international law, and played an important role in the nation's conduct during and after the time the Constitution was created. *See*, *e.g.*, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 143 (1812) ("it is impossible to conceive . . . that a Prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power . . ." (quoting Emmerich de Vattel); *5 Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal government of the United States and of the Commonwealth of Virginia*, 70 (1969) (reprint of 1803 ed.) (rights of ambassadors were a matter of universal concern recognized in English common law and were adopted by United States). *See also Boos v. Barry*, 485 U.S. 312, 323 (1988) (national concern for the protection of ambassadors and foreign ministers predates the Constitution); *Abdulaziz*, 741 F.2d at 1330 (precursor to Diplomatic Relations Act of 1978 was enacted in 1790 and "had been in effect unaltered for almost two hundred years"); *Republic of Phillipines v. Marcos*, 665 F. Supp. 793, 798 (N.D. Ca. 1987) (noting "rich jurisprudential and statutory history surrounding the international practice of diplomatic immunity");

1978 Senate Report, at 2, 1978 U.S.C.C.A.N. 1936 (1790 precursor to Diplomatic Relations Act of 1978 was "adapted from English statues [sic] dating back to the reign of Queen Anne").[10]

The extension of legal immunity to diplomatic persons is so embedded in our history and legal structure, it has been held to apply even if it precludes adjudication of constitutional claims. For example, "[c]ourts have protected the immunities of diplomatic officers against the constitutional clause guaranteeing the accused a right 'to have compulsory process for obtaining witnesses in his favor.' " Q. Wright, *The Control of American Foreign Relations*, 162 (1922) (citing cases and authorities). Likewise, where foreign states and their representatives properly invoke the level of immunity to which they are entitled (such types and levels of immunity can vary), a court may not proceed, even where constitutional jurisdiction is claimed. *See Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 710 (2d Cir. 1930) (constitutional grant of jurisdiction to the federal courts is necessarily limited by the right of a sovereign state to plead immunity); *Gerritsen v. Escobar & Cordova*, 721 F. Supp. 253 (C.D. Ca. 1988) (dismissing, on ground of consular immunity, claims that included allegations of civil rights violations by consular employees); I *Blackstone's*

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[10] In recognition of these important principles of international law, Article III of the Constitution implies a special legal status for ambassadors, stating that while "judicial Power shall extend in all Cases affecting Ambassadors, other Public Ministers and Consuls; . . . In all Cases affecting Ambassadors, other Public Ministers and Consuls . . . the supreme Court shall have original Jurisdiction." U.S. Const., art. III, sec. 2. In view of the long-held understanding even at the time the Constitution was framed that ambassadors are immune from most forms of judicial process, this provision cannot be viewed as a limit on immunity; rather, it recognizes that ambassadors have a special status, and in the limited event that they bring suit, or are attempted to be made subject to suit, they may invoke the original jurisdiction of the Supreme Court. (Congress has since determined that such original jurisdiction need not be exclusive, 28 U.S.C. § 1251.) Similarly, through Section 8(a) of the Diplomatic Relations Act of 1978, 28 U.S.C. § 1351, Congress extended the jurisdiction of the District Courts to suits against diplomatic personnel only "under circumstances where such suits will lie under the Vienna Convention." S. Rep. No. 95–1108, 95th Cong., 2nd Sess., at 5, *reprinted at* 1978 U.S.C.C.A.N. 1941, 1945 (1978).

Commentaries on the Laws of England, 376–80 (1916) (reprint of 1788 ed.) (explaining rationale and practice for the general understanding that "the rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions"). *Cf. Tuck v. Pan American Health Org.*, 668 F.2d 547, 549–50 (D.C. Cir. 1981) (dismissing, on ground of immunity under the IOIA, alleged constitutional and common law claims, including race discrimination claim, made against international organization). Indeed, in another context, the Second Circuit has made clear that a cause of action that would have been altogether barred by the immunities required by customary international law at the time of the Constitution's creation cannot be viewed as a Constitutional right. *See Ruggiero v. Compania Peruna de Vapores "Inca Capac Yupanqui"*, 639 F.2d 872, 878–81 (2d Cir. 1981) (Seventh Amendment jury trial right does not apply to cases brought against a foreign sovereign, as no suit at all could have been brought against such sovereign in 1791 due to sovereign immunity).

Similarly, neither the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"), nor international human rights law, abrogates properly asserted diplomatic immunities. *See Tachiona*, 159 F. Supp. 2d at 297 (dismissing on grounds of head-of-state immunity claims under the ACTA, Torture Victim Protection Act, 28 U.S.C. § 1350 note, § 2(a) ("TVPA"), and norms of international human rights law); *LaFontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (dismissing on grounds of head-of-state immunity claims under the Constitution, ATCA, TVPA, and customary international law). *See also Aidi v. Yaron*, 672 F. Supp. 516, 518 (D.D.C. 1987) (expressing doubt that defendant's alleged status as international law criminal could abrogate his diplomatic immunity for purposes of claims of personal injury and wrongful death of relatives killed at refugee camps in Beirut, Lebanon). Indeed, the seminal Second Circuit case that is widely viewed as revitalizing the ATCA in recent times, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), expressly noted that the defendant in that action did not claim diplomatic immunity. *Id.* at 879. *See also Kadic v. Karadzic*, 70 F.3d 232, 247–48 (2d Cir. 1996) (permitting ATCA action to proceed based, in part, on communications from State Department

and United Nations confirming that defendant did not have immunity from suit or legal process).

In view of the above, the claims against Mr. and Mrs. Hoque must be dismissed, regardless of whether plaintiff purports to invoke the Constitution, the ATCA, and/or customary norms of international law. This result is no different from that which stems from many other long-standing immunity doctrines that operate to bar adjudication of constitutional claims against government actors within their spheres of immunity. *See*, *e.g.*, *Federal Deposit Insurance Corp v. Meyer*, 510 U.S. 471, 484–86 (1994) (United States cannot be sued absent waiver of sovereign immunity, and there is no such waiver for constitutional torts); *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976) (prosecutors have absolute immunity from suit claiming constitutional violations); *Pierson v. Ray*, 386 U.S. 547, 553–554 (1967) (judges have absolute immunity from suit claiming constitutional violations).

It should be noted that the Vienna Convention provides in no uncertain terms that despite their immunity, diplomats are under an obligation to follow the laws of the receiving State. *Tabion*, 877 F. Supp. at 293 (citing Vienna Convention, Art. 41). While a diplomat's obligations to respect the laws of a host country cannot be judicially enforced where immunity has not been waived, the United States takes very seriously allegations of abuses of diplomatic privilege, and has both formal and informal means of obtaining compliance through the diplomatic process. Wood Decl., ¶ 7. As a formal matter, in certain circumstances, not present here, the State Department may request that the sending state waive the immunity of the diplomat. The General Convention makes clear that "[p]rivileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice. . . ." General Convention, Art. IV, sec. 14. If a waiver is not granted by the sending state, the United States also has the option—in consultation with the United Nations, as the United

Nations is technically the "receiving" entity, *see* 1986 *United Nations Juridical Yearbook*, at 320–21—to ask that such diplomat be removed from the country. *See* Headquarters Agreement, Article IV, sec. 13 (in case of abuse of privileges and immunities in activities outside a representative's official capacity, the United States retains the ability to exercise customary removal procedure applicable to diplomatic envoys accredited to United States); General Convention, United States Reservation No. 2 (same); Vienna Convention, art. 9(1) (procedure for declaring diplomat persona non grata). *See also* 1970 Executive Report, at 10 (testimony of Ambassador Charles W. Yost, U.S. Permanent Representative to the United Nations regarding the United States' right to expel United Nations representatives); Wood Decl., ¶ 15. These are examples of the "corresponding conditions and obligations" attendant upon the privileges and immunities of representatives to the United Nations and diplomats accredited to the United States.

Moreover, short of formal measures, which are not always appropriate, the State Department can examine a complaint and, if warranted, mediate that dispute through the mission to the United Nations. Wood Decl., ¶ 11. While use of the State Department's "good offices" for these purposes is voluntary for all concerned and cannot guarantee any particular result, in many instances, bringing the matter to the mission's attention, and focusing on it as a diplomatic matter, may ultimately induce voluntary compliance. Wood Decl., ¶ 12. *See also 767 Third Avenue*, 988 F.2d at 303 (noting that diplomatic efforts and pressure were extraordinarily successful at getting Zaire to pay back rent owed by its mission). The State Department has also taken diplomatic measures aimed at preventing abusive working conditions for domestic servants that come into this country to work for diplomats or employees of international organizations. *See* Wood Decl., ¶¶ 8–10.

III. *Failure of the United States to Respect Diplomatic Immunities Could Have Serious Consequences in the International Community*

As this lawsuit illustrates, diplomatic immunities can prevent persons allegedly wronged by those entitled to such immunities

from obtaining court review of their allegations. The United States takes seriously allegations of abuse of diplomatic privileges, and does not intend to downplay the potential negative consequences to individuals that can result from the requirement that the United States uphold its international obligations in this regard. Indeed, as discussed above (at 26–28), the State Department's diplomatic powers provide a means to attempt to mitigate such effects where appropriate. However, even in the face of potential adverse effects, the diplomatic immunities of United Nations representatives must be respected because they are vital to the conduct of peaceful international relations. Respecting diplomatic obligations is a fundamental component of harmony and comity in the international community. Wood Decl., ¶ 16. The importance of standing behind these universal norms of international law "is even more true today given the global nature of the economy and the extent to which actions in other parts of the world affect our own national security." *Boos v. Barry*, 485 U.S. at 323. The conduct of the United States with respect to the United Nations and representatives of its members in this country is a particularly visible portion of the international relations of the United States. Wood Decl., ¶ 17. The United Nations observes the degree and manner of the United States' compliance with its diplomatic obligations, and a failure by the United States to abide by its international responsibilities can damage the relationship between the United States and the United Nations. Wood Decl., ¶ 18.

It should also be noted that, as a leading scholar on diplomatic law has explained, "the real sanction of diplomatic law is reciprocity. Every State is both a sending and a receiving State. Its own representatives abroad are hostages and even in minor matters their treatment will depend on what the sending State itself accords." Eileen Denza, *Diplomatic Law* 2 (1976). This is equally true for representatives of other countries accredited to this country, and for representatives of other countries that are present here because they are accredited to the United Nations. *See 767 Third Avenue*, 988 F.2d at 296 (applying diplomatic protections under the Vienna Convention to Permanent United Nations Mission of the Republic of Zaire). In this context, the reason to respect diplomatic immunity is not "a blind adherence to a rule of law in

an international treaty, uncaring of justice at home, but that by upsetting existing treaty relationships American diplomats abroad may well be denied lawful protection of their lives and property to which they would otherwise be entitled." *Id.*

These concerns are central to this case. If the United States is prevented from carrying out its international obligations to protect the privileges and immunities of representatives to the United Nations, adverse consequences may well occur. Wood Decl., ¶ 19. At a minimum, the United States may hear objections for failing to honor its obligations not only from the Bangladesh Mission, but also from other United Nations member countries whose representatives derive diplomatic immunity from the same sources relied upon by Mr. and Mrs. Hoque in this action, and from the United Nations itself. *Id.* Indeed, a ruling by this Court limiting the diplomatic immunities of representatives to the United Nations in this country could, if applied generally, lead to erosion of the necessary and respected protections accorded by diplomatic immunities. Wood Decl., ¶ 20. As noted by the Second Circuit in *767 Third Avenue*, "Recent history is unfortunately replete with examples demonstrating how fragile is the security for American diplomats and personnel in foreign countries; their safety is a matter of real and continuing concern." 988 F.2d at 301.

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2. Vienna Convention on Diplomatic Relations: Saudi Arabian Embassy Documents

On December 11, 2002, William H. Taft, IV, Legal Adviser of the Department of State, appeared before the U.S. House of Representatives Committee on Government Reform, to address issues related to the Vienna Convention on Diplomatic Relations as applied to the correspondence and archives of an embassy. The committee convened the hearing to address the refusal of the Saudi Arabian embassy to comply with committee subpoenas for archives and documents of the embassy that had been passed to a third party, based on Saudi Arabia's claim that the documents were entitled

to protection under the Vienna Convention on Diplomatic Relations. The committee believed such requested documents could potentially further the investigation of kidnapped Americans in Saudi Arabia. The following excerpts from Mr. Taft's statement discuss the importance of the protection by the Vienna Convention to the interests of the United States abroad.

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

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In analyzing the Convention's proper interpretation, we must also weigh the legitimate interests of the United States overseas. We too rely heavily on the protections of the Vienna Convention. As the Committee knows, the Convention protects our embassies from intrusion, our diplomats from arrest, and our communications and archives from interference. Our diplomats and embassies are on the front lines in the fight against global terrorism. As we analyze the precise questions the Committee has raised, we must remain cognizant of the overall importance of the Convention to U.S. interests. U.S. agencies must therefore consider whether lack of protection under the Convention of all documents and information such as are sought by the Committee here would adversely affect our ability to carry out our responsibilities overseas.

Let me give you some concrete examples. The State Department uses local nationals and personnel to fill some positions in our embassies. Unlike U.S. citizen employees sent overseas by the Department, local nationals do not generally have immunity from compulsory process, so they must appear in a court or elsewhere if they receive a subpoena. Our research to date indicates that, in a number of instances, the Department has in fact asserted that the official information in the possession of a local national working in the embassy is "archival" under the Vienna Convention and thus inviolable. Our experience has been that when the local national appears and declines to answer questions about official activities, the issue is not pursued in that way. If countries take the view that these local personnel working with the U.S.

Government could be compelled to release information otherwise protected as Embassy archives, we would object strongly. And we believe Congress would expect us to do so.

Some of the same concerns extend to situations where we are relying on outside contracting. For example, the Department uses outside contractors for embassy construction. In such situations, cleared U.S. contractors and personnel build our embassies in sensitive posts working with information we provide them. To the best of our knowledge, up to the present, there has never been a situation in which foreign authorities have pressed one of these contractors to produce such information. If that were to happen, we would work vigorously in an attempt to protect the information. We would look seriously at asserting a claim of privilege, or inviolability, under the Vienna Convention. We would also consider other possible privileges and protections, such as state secrets, that might apply to these and other situations.

Examples such as these highlight why we are proceeding carefully in developing our conclusions.

On those rare occasions when U.S. Embassy representatives have been asked to appear before foreign legislatures, we have declined to do so on grounds of immunity under the Vienna Convention. On the same basis, U.S. embassies do not, as a matter of general practice, provide formal documentary submissions to foreign legislatures. The more information we require from embassies and their contractors, the more difficult it will clearly be for the United States to avoid reciprocal requests overseas.

It is in the context of these practices and functions of the United States Government that we analyze the Vienna Convention issues presented by the Committee's requests. Our starting point, shared we understand by the Committee and the Saudi government, is that embassy information and documentation in the embassy is inviolable and immune from process and similarly information in the hands of accredited diplomats and other embassy personnel is protected. Under Article 24 of the Convention, embassy archives are immune "wherever they may be" and "at any time." Under Article 27, embassy correspondence is "inviolable" and the state in which the embassy is located has an obligation to respect these rights and to protect free communication of the embassy. In this

respect the Vienna Convention binds the entire U.S. government, not just the executive branch.

The issue the Committee posed, as we understand it, is whether these materials retain that immunity under the Convention when they are given to, or relied upon by, third parties. As I have noted, this is a novel and complex question. In contemplating the reach of the Convention, we would need to consider a number of issues, including among others: what may constitute "archives" (an undefined term in the treaty), exactly what documents and other information may be encompassed in a demand for production, and the relationship of the person who holds the information to the embassy.

One of the difficulties in resolving the reach of the Vienna Convention in this context is that it has rarely been tested by courts here or abroad. There is little reported practice. So the mere fact that archives have passed to a third party does not resolve the issue.

* * * *

D. INTERNATIONAL ORGANIZATIONS

1. Immunity from Suit of the United Nations

On October 15, 2002, the United States filed a Statement of Interest in *Kamya v. United Nations*, No. 02–01176, U.S. District Court for the District of Columbia, expressing its view that, absent an express waiver, the United Nations is immune from suit in the courts of the United States. The complaint in *Kamya* related to a dispute between the United Nations and two different groups of claimants, both of which alleged to have owned premises in Mogadishu, Somalia, that the United Nations used between 1993 and 1995. The dispute was submitted to an arbitral tribunal, which issued a monetary award to the claimants. The United Nations refused to make payment pursuant to the award until the claimants agreed on the appropriate distribution of the award or entered into an escrow agreement. The award beneficiaries then filed

suit in U.S. federal court to compel payment. Excerpts from the U.S. submission are reproduced below.

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

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* * * *

The Convention on the Privileges and Immunities of the United Nations ("U.N. Convention") affords the U.N. absolute immunity absent express waiver. Accordingly, the jurisdictional question here is whether, under the U.N. Convention, the U.N. has expressly waived its immunity with respect to this case. If it has not, the Court lacks subject matter jurisdiction.

Under the U.N. Convention, the U.N. has absolute immunity "from every form of legal process except insofar as in any particular case it has *expressly* waived its immunity [, and] . . . no waiver of immunity shall extend to any measure of execution." U.N. Convention art. II, § 2 (emphasis added). Accordingly, unless there has been an express waiver by the U.N., suits against the U.N. must be dismissed for lack of subject matter jurisdiction. *See*, *e.g.*, *De Luca v. United Nations Organization*, 841 F. Supp. 531, 533 (S.D.N.Y. 1994), *aff'd* 41 F.3d 1502 (2d Cir.) (table), *cert. denied*, 514 U.S. 1051 (1995); *Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987). Importantly, "court[s] should be slow to find an 'express' waiver" of immunity. *Boimah*, 664 F. Supp. at 72; *cf. Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir. 1983) (noting that "courts should be reluctant to find that an international organization has inadvertently waived immunity when the organization might be subjected to a class of suits which would interfere with its functions.").

It is true that foreign states that agree to arbitrate are sometimes held to have *impliedly* waived their sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* ("FSIA"), which strips foreign states of their immunity if a state "has waived its immunity either explicitly *or* by implication," 28 U.S.C. § 1605(a) (1) (emphasis added). But, it is immaterial whether arbitration agreements would constitute an implied waiver of sovereign immunity under the FSIA, because the U.N. Convention

—not the FSIA or any other statute or treaty—is the governing law in this case. The U.N. Convention is specifically tailored to address the immunities of the U.N. and its officers. It specifies, for example, the immunities to be accorded to "[t]he United Nations," Art. II, § 2; "the Secretary-General" of the United Nations," Art. V, § 19; and the "[o]fficials of the United Nations," Art. V, § 18. By contrast, the FSIA establishes the immunities of "foreign state[s]" generally. 28 U.S.C. § 1604. The immunity standards of this more generalized law cannot override the U.N. Convention's treatment of the DELETE RETURN "narrow, precise, and specific subject" of the immunities of the U.N. *Radzanower v. Touche Ross*, 426 U.S. 148, 153 (1976) (statute dealing with specific subject is not submerged by a statute covering a "more generalized spectrum," absent "clear intention otherwise") (citation omitted). Thus, a court would not need to decide whether the activities at issue in this case amount to an implied waiver under the standards of the FSIA. *Cf. De Luca*, 841 F.Supp. at 533 n.1 (declining to consider whether FSIA exceptions applied, where the U.N. Convention, "which contains no such exceptions," shielded U.N. from suit).

* * * *

2. U.S. International Organizations and Immunities Act

In August 2002 Secretary of State Colin Powell confirmed acceptance of formulations concerning meetings to be hosted in the United States in a letter to the Director of Legal Affairs of the International Atomic Energy Agency ("IAEA"), Johan Rautenbach. Secretary Powell stated that all officials and individuals employed by the IAEA and participants representing Member States officially designated to attend hosted meetings in the United States would be equally granted privileges and immunities under the International Organizations and Immunities Act.

The full text of Secretary Powell's letter and the model text for IAEA inquiry to the United States about hosting a meeting or training course, are available at *www.state.gov/s/l/c8183.htm*.

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* * * *

I am pleased to advise you that the United States accepts the formulations concerning meetings to be hosted in the United States that were agreed at the meeting between you and Dr. Michael D. Rosenthal on 2002–07–23, including the editorial improvements agreed later. . . .

* * * *

We agree that all the categories of participants as now described in the amended text fall within the definitions of persons to whom privileges and immunities are extended under the U.S. International Organizations Immunities Act (IOIA). I note that the terms of the arrangements provide for the International Atomic Energy Agency (IAEA) to communicate to the United States, in the first instance, the Member States invited to participate and, subsequently, to inform the United States Government promptly of all its officials and individuals employed by it and participants representing Member States officially designated to attend the meeting.

I can confirm that, in view of the agreed new formulations, the arrangements would be implemented by the United States in a way that all of the persons noted above that participate in Agency meetings would be equally granted privileges and immunities under the IOIA.

* * * *

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 and applicable there. The doctrine does not involve immunity of a state or official but must instead be separately asserted. *See* Restatement of the Foreign Relations Law of the United States (3d ed. 1986), § 443. The most recent Supreme Court decision on the act of state doctrine is *Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990). Because the concepts are often discussed in cases involving issues of immunities, act of state is addressed here.

On August 2, 2002, the U.S. Court of Appeals for the District of Columbia Circuit held that a government's refusal to issue an export license and its expropriation of the shares of a corporation and conversion of the corporation's property were sovereign acts and that the act of state doctrine barred adjudication of a lawsuit based on those acts. *World Wide Minerals v. Republic of Kazakhstan*, 296 F. 3d 1154 (D.C. Cir. 2002). In that case, World Wide Minerals Ltd., a Canadian company, entered into agreements with the Republic of Kazakhstan, pursuant to which the plaintiff managed one of Kazakhstan's major uranium complexes and loaned Kazakhstan several million dollars to fund the restoration of the facility. World Wide alleged that Kazakhstan agreed, among other things, to permit World Wide to export Kazakhstan's uranium and that Kazakhstan breached its agreements by failing to issue to it a uranium export license and by seizing its assets in Kazakhstan. The court concluded that the relief sought on these claims would require it to examine the legality of the government of Kazakhstan's denial of licenses to export uranium, and that issuance of such licenses (and regulation of natural resources) was a sovereign act for which the policies underlying the act of state doctrine support its application. Similarly, citing *Banco Nationale de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964), the court found expropriation of the corporation's property to be the "classic act of state addressed in the case law."

See also the following cases discussed elsewhere in this volume.

(i) *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), discussed in chapter 6.G.3.a.(2). As to defendant's act of state arguments, the court held that claims based on war crimes (illegal blockage, torture, rape, and pillage) allegedly committed by the government of Papua New Guinea could not support a claim of "act of state," noting that they did not constitute "legitimate warfare." However, the court dismissed claims alleging environmental damage and race discrimination because adjudication of those claims would require review of the validity of "acts

of state." The U.S. Statement of Interest informing the district court that continued adjudication of this lawsuit "would risk a potentially serious adverse impact on the [Bougainville] peace process, and hence on the conduct of [United States] foreign relations" is set forth in *Digest 2001* at 337–339.

(ii) *Doe v. ExxonMobil Corp.*, No. 01-VC-1357 (D.D.C.), discussed in Chapter 6.G.3.d.(2). The U.S. Statement of Interest filed in that case provided the views of the Department of State that adjudication of the lawsuit would risk a "potentially serious adverse impact on significant interests of the United States, including interests related directly to the ongoing struggle against international terrorism" and might "also diminish our ability to work with the government of Indonesia . . . on a variety of important programs, including efforts to promote human rights in Indonesia."

(iii) *Doe v. Liu Qi and Plaintiff A v. Xia Deren,* C 02-0672 and C 02-0695, respectively, discussed *supra*, A.2.a. A letter from William H. Taft, IV, Legal Adviser of the Department of State, filed with the U.S. District Court for the Northern District of California in that case, observed:

> We believe . . . that U.S. *courts* should be cautious when asked to sit in judgment on the acts of foreign officials taken within their own countries pursuant to their government's policy. This is especially true when (as in the instant cases) the defendants continue to occupy governmental positions, none of the operative acts are alleged to have taken place in the United States, personal jurisdiction over the defendants has been obtained only by alleged service of process during an official visit, and the substantive jurisdiction of the court is asserted to rest on generalized allegations of violations of norms of customary international law by virtue of the defendants' governmental positions. Such litigation can serve to detract from, or interfere with, the Executive Branch's conduct of foreign policy.

F. OTHER ISSUES OF STATE REPRESENTATION

1. Location of Diplomatic and Consular Buildings

In March 2001 the United States, as intervening defendant, moved for summary judgment and opposed plaintiffs' motion for summary judgment in *2120 Kalorama Rd, Inc. v. District of Columbia Foreign Missions Act-Board of Zoning Adjustment*, Civil Action No. 00–1568. At issue in that case was the decision of the District of Columbia Foreign Missions Act–Board of Zoning Adjustment ("the Board") not to disapprove an application filed on behalf of the embassy of the Republic of Benin to permit the location of a chancery in Washington, D.C. In its memorandum in support of summary judgment, the United States argued that the district court should affirm the Board's decision since it was consistent with both the Foreign Missions Act ("FMA") and the District of Columbia Administrative Procedure Act ("DCAPA"). After concluding that the Board's decision was based upon substantial evidence in the record, the court affirmed the decision and granted summary judgment on behalf of the defendants. For a more detailed discussion of this case and for excerpts from the U.S. memorandum, *see Digest 2001* at 540–547.

The full text of the district court's order and memorandum are available at *www.state.gov/s/l/c8183.htm*.

2. Real Property Taxes

a. Libyan mission tax lien

The U.S. Department of State informed the City of New York, Department of Finance, that it could not proceed with a tax lien sale against property in New York belonging to the Permanent Mission of the Socialist People's Libyan Arab Jamahiriya to the United Nations ("Libyan Mission"). On April 9, 2002, David P. Stewart, Assistant Legal Adviser for Diplomatic Law and Litigation, U.S. Department of State, wrote to the New York Department of Finance requesting

immediate action to terminate the tax lien sale on the Libyan Mission and to withdraw the tax notice on the property. As set forth in the excerpts from the letter set forth below, pursuant to the Libyan Sanctions Regulations and the Vienna Convention on Diplomatic Relations, the Libyan Mission's property could not be subjected to the New York tax lien sale.

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

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As the City of New York is aware, under article 22(3) of the Vienna Convention on Diplomatic Relations ("VCDR"), applicable to Missions to the United Nations under article 105, para. 2, of the United Nations Charter, and article V, section 15, of the United Nations Headquarters Agreement, the "premises of the mission . . . shall be immune . . . from attachment or execution." The prohibition against attachment precludes a tax lien against the Libyan Mission's property, and necessarily also the sale of such a lien. This treaty obligation of the United States, of course, extends to state and local governments.

In addition, as a result of economic sanctions imposed by the United States on Libya, the tax lien sale contemplated in the tax notice is prohibited unless it is authorized by the U.S. Department of the Treasury. Pursuant to the authority of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701–06, the President has broad powers to "block" the assets of foreign governments and to prohibit economic transactions of any kind concerning such assets. Acting under IEEPA and other authorities, on January 8, 1986, President Reagan ordered "blocked all property and interests in property of the Government of Libya . . . in the United States" and authorized the Secretary of the Treasury to carry out the Order pursuant to IEEPA. Exec. Order No. 12544 (Jan. 8, 1986), 51 Fed. Reg. 1235. Pursuant to this Order, the Treasury Department, Office of Foreign Assets Control, issued the Libyan Sanctions Regulations, 31 C.F.R. Part 550 (the "Sanctions Regulations").

The Sanctions Regulations define "blocked property" as "any property in which the Government of Libya has an interest, with respect to which . . . transfers or . . . other dealings may not be made or effected except pursuant to an authorization or license." 31 C.F.R. 550.316. The term "interest," when used with respect to property, means "an interest of any nature whatsoever, direct or indirect." 1 C.F.R. 550.315. Liens are expressly included within the scope of the restrictions. 31 C.F.R. 550.314. The term "transfer" is defined broadly, to include "the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, injunction, execution, or other judicial or administrative process or order. . . ." 31 C.F.R. 550.313. Unless licensed by the Department of the Treasury, Office of Foreign Assets Control, "no property or interests in property of the Government of Libya that are in the United States . . . may be transferred . . . or otherwise dealt in." 31 C.F.R. 550.209(a). Finally, again unless licensed or otherwise authorized, "any attachment, judgment, decree, lien, execution, garnishment or other judicial process-is null and void with respect to any property in which [after January 8, 1986] there existed an interest of the Government of Libya." 31 C.F.R. 550.210(e).

Under the Sanctions Regulations, property in which the Government of Libya has an interest, including its UN Mission property, is blocked, and is not subject to attachment or lien, unless licensed by the Office of Foreign Assets Control. Moreover, any unlicensed transaction, such as the tax lien sale contemplated in the tax notice to the Libyan Mission, may be deemed "null and void" pursuant to the Sanctions Regulations. Because the purported "tax lien sale" is prohibited under federal law, the City of New York should immediately withdraw the tax notice and terminate any procedures thereunder.

Finally, the City of New York should be aware that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–11 ("FSIA"), is the "sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989). The FSIA provides specific rules for service of process on foreign states (28 U.S.C. § 1608), and provides personal jurisdiction over a foreign state only where service has been effected under

that section (28 U.S.C. § 1330). The FSIA contains a presumption of sovereign immunity, subject to exceptions specified in the statute. See *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985) (property tax proceedings against residence of head of Libyan Mission barred by FSIA). In any proceedings against a foreign government for taxes allegedly due, the City of New York would need to proceed in accordance with the FSIA.

Please confirm that the proposed tax lien sale and tax notice against the premises of the Libyan Mission to the United Nations have been withdrawn. . . .

b. New York State transfer tax: Egyptian Mission

In response to a request from the Egyptian Permanent Mission to the United Nations ("Egyptian Mission"), the United States Department of State provided a letter-opinion concerning the validity of the Egyptian Mission's efforts to secure a refund of the New York State transfer tax paid in connection with the sale of its premises. In the letter, dated September 30, 2002, David P. Stewart, Assistant Legal Adviser for Diplomatic Law and Litigation, U.S. Department of State, stated that under Article 23 of the Vienna Convention on Diplomatic Relations, the Egyptian Mission enjoys tax exemption in the United States with respect to the premises of the mission. Moreover, the letter stated that the treaty obligation is binding on states and municipalities. Excerpts from the letter are set forth below.

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

We write in response to the request of the Egyptian Permanent Mission to the United Nations ("Egyptian Mission") that the United States Department of State provide this letter-opinion concerning the validity of the Egyptian Mission's efforts to secure a refund of the New York State Transfer. . . . The tax was paid

by the Egyptian Mission under protest in connection with the sale of premises of the mission. . . .

Please be advised that the Egyptian Mission enjoys tax exemption in the United States with respect to the premises of the mission under Article 23 of the Vienna Convention on Diplomatic Relations, made applicable by Article 105 paragraph 2 of the United Nations Charter and Section 15 of the United States-United Nations Headquarters Agreement. Article 23 provides as follows:

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

Under this provision the Egyptian Mission enjoys exemption from taxes associated with the sale of its mission premises. This treaty obligation is binding on states and municipalities as well as on the federal government. United States Constitution, Article VI; *United States of America v. County of Arlington*, 702 F.2d 485, 488 (4th Cir. 1983).

The Department understands that New York law relieves a seller or grantor of liability for the transfer tax where the seller or grantor is tax-exempt, as was the Egyptian Mission, and in certain circumstances shifts responsibility for the tax to the non-exempt buyer or grantee. (See Tax Law 1404(a) & 1405(a)(2), and Codes of Rules and Regulations of the State of New York 575.9(b)). This state law would require a buyer to pay the tax only where the seller is tax exempt. Because this would cause a buyer to reduce its purchase price it would effectively deprive the foreign government of a treaty-based tax exemption. The Department is of the view that where, as here, implementation of a state statute acts to deprive a foreign government of a treaty-based tax exemption by shifting the tax liability to the buyer to avoid the

tax exempt status of the seller, the statute violates the treaty obligations of the United States when applied to a foreign government. Clearly, the statute operates to manipulate the tax liability to the prejudice of a tax-exempt foreign government seller. Such a result cannot stand under United States law and treaty obligations. See generally *United States v. City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y.), *aff'd*, 450 F.2d 884 (2d Cir. 1971).

* * * *

3. Service of Process on Visiting Foreign Officials

a. Feng Suo Zhou v. Li Peng

Chinese student activists brought an action in 2000 in the United States against Li Peng of the People's Republic of China, alleging human rights violations arising out of the 1989 Tiananmen Square protests in Beijing. At the time of the Tienanmen Square incident, Li Peng was premier of the People's Republic and subsequently became president of the National People's Congress. The District Court for the Southern District of New York held that the defendant had been properly served with process during a visit to New York to attend a United Nations-sponsored event, when a member of his U.S. Department of State Diplomatic Security Detail accepted a copy of the summons and complaint pursuant to an order of a U.S. district judge which directed that "service shall be accomplished by delivering a copy of the summons and complaint to any employee of the United States government or its agencies who is guarding defendant Li Peng during his stay in New York. Said employee is to forthwith provide said defendant with the said copy of the summons and complaint during defendant's stay in New York." 2002 U.S. Dist. LEXIS 14648.

In June 2001, the United States filed a Statement of Interest asserting that such service was improper for several reasons, including lack of actual notice, interference with the security functions performed by the protective detail, and infringement upon the executive branch's responsibility for

foreign affairs. *See Digest 2001* at 550–553. On August 8, 2002, the district court held that the order in question satisfied due process because it was reasonably calculated to give Premier Li Peng actual notice of the action alleging human rights violations. *Zhou v Li Peng*, 2002 U.S. Dist. LEXIS 14648 (S.D.N.Y. 2002). Excerpts from that unpublished opinion follow (footnotes and citations omitted).

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* * * *

From 1988 until 1998, defendant, Li Peng, was the Premier of the People's Republic of China. Under the constitution of the People's Republic of China, the Premier, as the head of the State Council, holds the power "to alter or annul inappropriate orders, directives and regulations issued by the ministries or commissions" and "to alter or annul inappropriate decisions and orders issued by local organs of state administration at various levels." Since 1998, defendant has served as President of the National People's Congress, which oversees the security forces and the judicial system of the People's Republic of China.

Plaintiffs allege that Li Peng was responsible for summary execution, arbitrary detention, torture, and other torts that resulted in thousands of casualties. Specifically, the complaint asserts that Li Peng's proclamation of martial law on May 20, 1989, led to orders authorizing the use of force against the Tiananmen Square protesters. . . .

* * * *

The sole issue before this Court is whether plaintiffs have effectuated service on defendant, Li Peng. Plaintiffs aver that service was effectuated on defendant in two different ways: (1) by delivery of the summons and complaint to Special Agent Eckert of the Department of State Security Detail protecting Li Peng, pursuant to the Part I Order. . . .

* * * *

The Government concedes that a copy of the summons and complaint was delivered to Special Agent Eckert, an employee of

the United States Government who was guarding Li Peng. However, the Government argues that service is complete under the Part I Order only when an employee of the United States guarding Li Peng actually delivered a copy of the summons and complaint to Li Peng. Moreover, the Government asserts that reading the Part I Order to mean that service is complete once the process was delivered to an employee of the United States guarding Li Peng, would raise constitutional issues and spawn policy problems for the Government.

To satisfy the requirements of Due Process under the Constitution, service must provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.

* * * *

Here, after concluding that all other service methods would be impracticable, plaintiffs sought a court-ordered method of service, which was utilized successfully in a similar action. In *Kadic v. Karadzic,* 70 F.3d 232, 246 (2d Cir. 1995), there was no question regarding the sufficiency of service because the summons and complaint was actually delivered to the defendant by the United States Security Detail who previously accepted the summons and complaint pursuant to a court order. *Kadic*, 70 F.3d at 246–47.

* * * *

This Court finds that service on Li Peng was complete under the Part I Order when plaintiffs' process server delivered a copy of the summons and complaint to Special Agent Eckert. A plain reading of the Part I Order supports this conclusion. The Part I Order states, "service shall be accomplished by delivering a copy of the summons and complaint to any employee of the United States government or its agencies who is guarding defendant

Li Peng during his stay in New York." Then in a separate sentence it directs "[s]aid employee is to forthwith provide said defendant with the said copy of the summons and complaint during defendant's stay in New York." Nothing in the Part I Order intimates that service is not complete until the Security Detail delivers the documents to Li Peng. To the contrary, the first sentence of the Part I Order specifies how service is to be "accomplished," while the second sentence embodies a separate direction to the Security Detail, entirely beyond the orbit of the process server.

* * * *

. . . . Requiring plaintiffs to deliver a copy of the summons and complaint to Li Peng's United States Government Security Detail satisfies the requirements of due process since it was reasonably calculated to give actual notice of this lawsuit to defendant. Neither plaintiffs nor the Part I judge had any reason to believe that the United States Government employee to whom the summons and complaint were handed, would not in turn take the appropriate steps to deliver those documents to Li Peng. In *Kadic* that is precisely what happened. This Court, thus, finds that this method of service was reasonably calculated to give defendant actual notice of the action at the time Judge Casey signed the order.

* * * *

The Department of State's argument that its protective detail are not agents of the protectee for purposes of accepting service and delivering papers to the protectee are unavailing. The Part I Order does not require service on an agent of Li Peng; rather, it required service on those law enforcement officers closest to Li Peng and accessible to plaintiffs because of the security net around the former Chinese Premier. The purpose of plaintiffs' *ex parte* motion for an order authorizing an alternate means of service is so they can effect service in a non-traditional way, which may include serving persons who are not agents of the defendant for accepting service. *See Harkness*, 689 N.Y.S.2d at 587 ("CPLR 308(5) gives a court 'broad discretion to fashion proper methods of notice in unpredictable circumstances."

Although the Department of State's Security Detail's function is to provide security and not serve process, a tangential effect of their existence should not be the immunization of protectees from service of process. If a protectee, like Li Peng, wishes to assert a immunity defense or raise any issues concerning human rights law or the power to conduct foreign relations, those arguments should be presented in a court of law. The physical presence of a Security Detail does not insulate a protectee from the judicial process or empower the Department of State to determine unilaterally who among its protectees can be served with legal process. Finally, the Government's argument is further undermined by the axiomatic principle that service is authorized on non-agents of a defendant by the Federal Rules and the CPLR. *See*, *e.g.*, Fed.R.Civ.P. 4(e)(2) (permitting service on person of suitable age and discretion); N.Y. C.P.L.R. 308(2) (same).

* * * *

This Court is mindful of the difficult task the Department of State faces in protecting foreign dignitaries. However, the function of the Diplomatic Security Detail is to protect foreign dignitaries, like Li Peng, from physical harm, not service of process. Apart from that, the unique way in which events unfolded in this case is unlikely to be replicated thereby narrowing the scope of this Court's holding.

* * * *

b. Wei Ye v. Jiang Zemin

On October 18, 2002, adherents of the Falun Gong movement filed a class action suit against then-President Jiang Zemin of the People's Republic of China. *Wei Ye v. Jiang Zemin*, U.S. District Court for the Northern District of Illinois, No. 02 C 7530. Three days later, plaintiffs obtained an *ex parte* order authorizing alternative service of process by delivery of the summons and complaint to security agents guarding President Jiang during his visit to Chicago. The order purported to authorize service by delivery to agents of the State Department security detail, the U.S. Secret Service, the FBI,

the Illinois State Police motorcade detail, hotel security, and Chinese staff security, with instructions that the security officer was to forthwith serve the summons and complaint on President Jiang.

The excerpts below from the corrected United States Motion to Vacate October 21, 2002 Order and Statement of Interest or, in the Alternative, Suggestion of Immunity set forth the U.S. view that the service order was invalid because it was not authorized by a waiver of U.S. sovereign immunity and because it violated separation of powers principles, thus, among other things, interfering with the conduct of foreign relations and the protection of visiting foreign dignitaries (footnotes deleted). *See also* B.1, *supra*.

The full text of the motion and attached declarations referred to in the excerpts is available at *www.state.gov/s/l/c8183.htm*.

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* * * *

The United States of America appears in this matter to move for vacatur of the October 21, 2002 Order directing federal officials to serve process on Defendant Jiang Zemin, President of the People's Republic of China, during his October 22–23, 2002 visit to Chicago. In addition, pursuant to 28 U.S.C. § 517, we further state the United States' interest with respect to the Order's provision for service on President Jiang through state and local security officials, note that service was not achieved under the Order's terms, and suggest, in the alternative, the immunity of President Jiang as head of the People's Republic of China.

INTRODUCTION

Fundamental, constitutionally based principles of sovereign immunity and separation of powers preclude Article III courts from ordering federal security personnel to serve process on a visiting head of state during the course of their duty to protect that foreign leader. Separation of powers principles are likewise offended by an order that compels federal security personnel to

serve process on a foreign head of state whom they are charged with guarding. Such a method of service directly interferes with the Executive Branch's conduct of foreign relations, causing diplomatic problems of the greatest magnitude at the highest levels of our government. Indeed, the Court's October 21 Order has had direct impacts on foreign relations between the United States Government and the People's Republic of China, nations that have an important yet delicate relationship. The harm to foreign relations of an alternate service order such as the October 21 Order flows whether the officials charged to effect service are federal, state, or local law enforcement security personnel responsible for guarding the visiting dignitary. It is, therefore, the United States' position that the October 21 Order is invalid and that it should be vacated.

Even if the October 21 Order had been validly entered, its premise that the security officials it identifies would be in President Jiang's physical proximity and thus able personally to deliver a copy of the summons and complaint to him was inapplicable with regard to Chicago Police Commander Joseph P. Griffin, who was not responsible for guarding President Jiang. Additionally, Plaintiffs have presented no evidence that service of the summons and complaint on President Jiang was effected under the October 21 Order's terms. Plaintiffs offer no evidence that they delivered a copy of the summons and complaint to a security official helping to guard President Jiang, or that any such security official delivered a copy of the summons and complaint to President Jiang.

Finally, in the alternative, the United States suggests that, as head of the People's Republic of China, President Jiang enjoys immunity from this lawsuit. The personal inviolability that derives from head-of-state immunity in addition renders him immune from service of process, and thus also from the jurisdiction of this Court.

* * * *

1. The October 21, 2002 Order is Invalid as Unauthorized by a Waiver of Sovereign Immunity and Violates Separation of Powers Principles

The Court lacked jurisdiction to require federal security personnel to serve process on a visiting head of state because no

waiver of the sovereign immunity of the United States allows such an order. Moreover, enlisting federal and local officials to serve process on a visiting foreign dignitary whom they are charged with protecting would so impair the Executive Branch's ability to conduct foreign relations that it would conflict with the constitutional principle of separation of powers.

a. No Waiver of Sovereign Immunity Permits the Court to Compel Officers of the United States to Serve Process

The United States and its officers are immune from judicial proceedings unless there is an applicable congressional waiver of sovereign immunity. *See, e.g.*, *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33–34 (1992); *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *Berman v. Schweiker*, 713 F.2d 1290, 1300 (7th Cir. 1983). Only Congress may waive the United States' sovereign immunity, and any waiver, "to be effective, must be 'unequivocally expressed,'" *Nordic Village, Inc.*, 503 U.S. at 33–34 (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 [1990]), and "will not be implied," *Lane v. Pena*, 518 U.S. 187, 192 (1996). Absent a clear waiver of sovereign immunity by Congress, courts are without jurisdiction to exercise judicial authority as to the United States or its officers. *E.g.*, *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

* * * *

The October 21 Order expressly compels United States officials both to accept delivery of a copy of the summons and complaint and to serve the copy on President Jiang: "[S]ervice shall be accomplished by the delivery of a copy of the summons and complaint to [] any of the security agents helping to guard Defendant Jiang Zemin . . . [S]aid security agent is to forthwith serve said defendant with the said copy of the summons and complaint . . ." However, neither the Order nor Plaintiffs' *ex parte* motion for the Order identifies an express waiver of sovereign immunity that permits U.S. courts to compel officials of the United States to accept a summons and complaint or to serve process. Rather, Plaintiffs sought, and the Court evidently issued, the

October 21 Order on the purported authority of Federal Rule of Civil Procedure 4(e)(1) and, by incorporation, Illinois law regarding service, 735 Ill. Comp. Stat. 5/2–203.1.

* * * *

No waiver of the United States' sovereign immunity authorized the Court to direct officials of the State Department, the Secret Service, and the FBI to serve process on President Jiang, and thus the Court was without jurisdiction to enter the October 21 Order. *See, e.g.*, *Mitchell*, 445 U.S. at 538. The October 21 Order is therefore invalid as entered in violation of the United States' sovereign immunity and without a jurisdictional basis.

b. Compelling Federal, State, and Municipal Security Officials to Serve Process on a Visiting Head of State Offends Separation of Powers Principles

The ability of the Executive Branch to conduct foreign relations is significantly compromised by an order compelling federal and municipal security officials to serve process on a visiting head of state whom they are responsible for guarding. Such an infringement directly conflicts with the constitutional principle of separation of powers.

It is well-established that the conduct of foreign relations is a sensitive political function that the Constitution vests in the Executive Branch or, in certain instances, the Executive Branch in conjunction with the Legislative Branch. *E.g.*, *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988); *Haig v. Agee*, 453 U.S. 280, 293–94 (1981); *Chicago & Southern Airlines*, 333 U.S. 103, 111 (1948); *United States v. Pink*, 315 U.S. 203, 222–23 (1942); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001); *Flynn v. Shultz*, 748 F.2d 1186, 1190 (7th Cir. 1984). Article II, § 2 of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur," and "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and

Consuls . . .” Article II, § 3 provides that the President “shall receive Ambassadors and other public ministers . . .”

> Taken together with the command of article II, § 3 that the President “shall take Care that the Laws be faithfully executed,” these constitutional provisions have come to be regarded as explicit textual manifestations of the inherent presidential power to administer, if not necessarily to formulate in any autonomous sense, the foreign policy of the United States.

Laurence H. Tribe, American Const. Law § 4–3 at 638 (3d ed. 2000). “ ‘As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.’ ” *Egan*, 484 U.S. at 529–30 (quoting *United States v. Nixon*, 418 U.S. 683, 710 [1974]). Accordingly, matters “vitally and intricately interwoven with contemporaneous policies in regard 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.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952); *see also INS v. Chadha*, 462 U.S. 919, 951 (1983) (“The hydraulic pressure inherent within each of the separate [b]ranches to exceed the outer limits of power, even to accomplish desirable objectives, must be resisted.”); *Adams v. Vance*, 570 F.2d 950, 955 (D.C. Cir. 1978) (“This country’s interests in regard to foreign affairs and international agreements may depend on the symbolic significance to other countries of various stances and on what is practical with regard to diplomatic interaction and negotiation. Courts are not in a position to exercise a judgment that is fully sensitive to these matters.”).

i. Alternative Service Orders Such as the October 21 Order Have a Chilling Impact on the Executive Branch’s Conduct of Foreign Relations

As explained in the attached Declaration of Donald W. Keyser, Deputy Assistant Secretary of State for the Bureau of East Asian and Pacific Affairs, the October 21 Order and orders like it interfere

substantially with the Executive Branch's ability to foster an environment that encourages heads of state and other foreign dignitaries to visit the United States and that is conducive to productive bilateral relations. (Decl. of Donald W. Keyser.) There is a real risk that a foreign government whose leader is served with process by host state protective personnel (e.g., State Department Diplomatic Security, FBI, Secret Service, and local police) will take offense at the service, viewing it at a minimum as "incompatible with the proper role of security personnel to ensure the safety and tranquility of the foreign dignitary during his or her visit" or at worst as "acts of calculated duplicity to ensnare the foreign leader." (*Id.* ¶ 3.) "The foreign government may also interpret such service as official United States Government support for the underlying lawsuit." (*Id.*)

Mr. Keyser's declaration explains that these concerns are magnified when the foreign dignitary identified in an alternate service order is a head of state such as President Jiang. (*Id.* ¶ 6.) Indeed in this case, media reports that President Jiang had been served with process through U.S. security personnel threatened to impede the Crawford, Texas summit between President Bush and President Jiang and to jeopardize U.S.-China relations. (*Id.* ¶ 7.) Mr. Keyser explains that senior Chinese officials protested the suit repeatedly and "emphasized . . . particular dissatisfaction that U.S. security personnel had reportedly accepted documents relating to the suit, and had failed to ensure that President Jiang's visit was free of disruption." (*Id.*) These concerns were considered so serious that Chinese officials warned that there could be "a most deleterious impact on the atmosphere surrounding the Crawford summit and on the bilateral relationship." (*Id.*)

Not only did the October 21 Order risk a direct effect on a presidential summit, but it and similar orders would have the potential to cause foreign dignitaries to think twice before agreeing to travel to and attend meetings in the United States. Mr. Keyser describes the recent refusal of the Chinese government to send representatives to the United States to participate in an important anti-narcotics training course due to concerns about possible service of process. (*Id.* ¶ 4.) The consequences of a reluctance among foreign leaders to come to the United States to engage in diplomacy

are potentially serious for the government's ability to conduct foreign relations. (*Id.*)

Mr. Keyser further explains that on recent occasions Chinese officials have refused to accept official United States Government communications from State Department officers because of stated concerns that those officers might have been designated as process servers by United States courts. (*Id.* ¶ 5.) For example, on August 8, 2002, the political counselor at China's Embassy in Washington, D.C. refused to accept documentation from the State Department's China desk director except by facsimile, for fear of unwittingly accepting a court order or subpoena. (*Id.*) The exchange of diplomatic notes and written positions "is the essence of diplomacy." (*Id.*) A reluctance among foreign diplomats to accept such diplomatic correspondence because of orders such as the October 21 Order poses yet another serious obstacle to the United States' conduct of foreign affairs.

ii. Alternative Service Orders Such as the October 21 Order Increase the Risk that Senior U.S. Officials Will Be Subjected to Service and Legal Proceedings Abroad

Were U.S. courts to permit service upon foreign heads of state and other dignitaries in the fashion contemplated by the October 21 Order, foreign courts and authorities will be more likely to issue similar orders regarding service on the President of the United States and senior U.S. officials during their travels abroad. Mr. Keyser explains this concern regarding reciprocity:

> To the extent that United States courts issue orders authorizing alternate service of process on high-level visiting foreign dignitaries—especially via our protective services—it is increasingly likely that foreign governments and judicial authorities will be inclined to permit service and legal proceedings that may be detrimental and embarrassing to high-level United States officials visiting abroad. Indeed, allowing such methods of service here would provide foreign interests with ready-made grounds for initiating retaliatory service and lawsuits against United States

> officials overseas—actions that we might regard as offensive, politically-motivated, and disruptive to the conduct of our foreign relations.

(*Id.* ¶ 9.) Service of foreign lawsuits on the U.S. President or high-level U.S. officials while they are conducting the nation's business abroad would further disrupt the Executive Branch's conduct of foreign affairs, and is thus another potential harmful effect of orders like the October 21 Order.

iii. Alternative Service Orders Such as the October 21 Order Interfere with the Protection of Visiting Foreign Dignitaries

The Declaration of Peter E. Bergin, Principal Deputy Assistant Secretary of State for the Bureau of Diplomatic Security ("DS") and Director of the Diplomatic Security Service, United States Department of State, explains that the primary duty of DS protective detail officers is to insulate their charges from potential dangers. (Decl. of Peter E. Bergin ¶ 4 [Attach. C].) Accomplishment of this task "depends upon the ability of DS protective personnel to operate in close physical proximity and with full access to the protected foreign official," and "in close coordination with other security officers, including those provided by the foreign government." (*Id.* ¶ 2). For the United States to provide optimal security, the protective detail must be provided unfettered information, including a detailed itinerary, and must "enjoy the trust and confidence of the protectee." (*Id.*)

DS officers' protective duties do not encompass serving process on foreign officials at a court's behest. (*Id.* ¶ 4) Mr. Bergin explains that "should foreign dignitaries come to view their United States Government and other protective personnel (including local police and private security) as potential process servers, they would likely withdraw from and otherwise limit cooperation with such personnel." (*Id.* ¶ 5.) Such withdrawal and limitation of cooperation could profoundly compromise the foundation of the protective process. (*Id.*) Moreover, the prospect that security personnel might be charged to act as process servers could "undermine the critical element of trust and confidence between protector and protectee

that is essential to the effective operation of the security function." (*Id.*) Were the trust and confidence between protective personnel and foreign dignitaries so undermined, the results could be "catastrophic"—not only to the United States' ability to provide security to visiting dignitaries, but also to its relations with foreign nations. (*Id.* ¶ 6.) "Should death or injury occur to a foreign leader during a visit to the United States, there would likely be severe and lasting damage to our relations with that leader's government." (*Id.*) These concerns are heightened in the current climate of increased terrorist threats. (*Id.*)

The attached Declaration of Donald A. Flynn, Assistant Director of the United States Secret Service for the Office of Protective Operations, likewise explains that orders for alternate service through Secret Service agents is inconsistent with and could distract the agents from their mission to protect visiting heads of state in accordance with 18 U.S.C. § 3056. Indeed, if Secret Service agents or other security personnel were expected to deliver service of process to visiting heads of state whom they are guarding, they would have to inspect the documents, an obvious distraction from their job of observing the environment around their protectee in order to identify potential threats. (*See id.* ¶ 6.) Mr. Flynn further explains that "[i]f a foreign head of state were to perceive his or her Secret Service protective detail as having any function other than protection, he or she may push away the Secret Service's 'protective envelope' thereby making [the individual] more vulnerable to assassination or other physical harm." (Decl. of Donald A. Flynn ¶ 5 [Attach. D].) Mr. Flynn also underscores Mr. Bergin's warning about the possibly grave consequences of a breach in security during a head of state's visit to the United States: "For obvious reasons, if the assassination of a foreign head of state were ever to occur on American soil, the results could be catastrophic from a foreign relations and national security standpoint." (*Id.* ¶ 7.)

The concerns related above are similar if the security official directed to effect service on a visiting dignitary is a municipal official charged with guarding the dignitary. It is reasonable to anticipate that the foreign dignitary's government may not distinguish between federal security personnel and state or municipal

security personnel and instead view service effected through a state or municipal security official as attributable to the United States. In addition, the risk of compromised security if a foreign dignitary were to withdraw from municipal security personnel or limit cooperation with them are the same as the risks described by Messrs. Bergin and Flynn in the case of federal protective personnel. Again, were a foreign dignitary killed or injured during a visit to the United States, the reaction of the dignitary's government and the harm to the United States' relations with that government likely would not differ if the security personnel involved were municipal officers rather than federal officers.

* * * *

As the declarations of Messrs. Keyser, Bergin, and Flynn make clear, service of process on foreign dignitaries through the host state protective personnel assigned to guard them is a matter "vitally and intricately interwoven" with the Executive Branch's conduct of foreign relations. *Harisiades*, 342 U.S. at 588–89. Those declarations further establish that orders for alternate service such as the October 21 Order have a direct and detrimental impact on the United States' ability to conduct foreign relations. Such an interference with the conduct of foreign relations is incompatible with the respect for the separation of powers that the Constitution mandates. *See, e.g.*, *id.* at 589. For all of these reasons, the October 21 Order does not withstand constitutional scrutiny.

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Cross Reference

U.S. sovereign immunity, **Chapter 8.B.5.**

Chapter 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Bilateral Open Skies Agreements

a. New bilateral Open Skies agreements

On January 22, 2002, an agreement amending the U.S.-France Air Transport Agreement of 1998 to incorporate "Open Skies" principles entered into force. The United States and Uganda initialed an "Open Skies" air-transport agreement on June 4, 2002. These were the twentieth Open Skies agreement entered into with a European country and the eleventh with an African country, respectively. In addition, a U.S.-Jamaica Open Skies agreement was initialed on October 30, 2002. As with other such agreements, these instruments eliminate restrictions on how often carriers can fly, the kind of aircraft they can use, and the prices they can charge. The agreements cover both passenger and cargo services, as well as scheduled and charter operations. A fact sheet listing U.S. Open Skies agreements initialed through October 2002 and links to texts of the agreements is available at *www.state.gov/e/eb/rls/fs/14441.htm*.

In a press release on October 19, 2001, concerning the U.S.-France agreement, the U.S. Department of Transportation had noted that for France the new agreement:

> . . . builds on the liberalized U.S.-France agreement that was signed in June 1998. While that agreement provided for the gradual elimination of restrictions on air services between the two countries, today's Open-Skies agreement also removes restrictions on service to intermediate and beyond countries.

As to the U.S.-Uganda agreement, a press release of June 4, noted that:

> The U.S.-Uganda agreement offers U.S. scheduled and charter cargo carriers special benefits that extend aviation liberalization even beyond the standard Open-Skies provisions by permitting U.S. airlines to fly cargo from Uganda to third countries without also serving the United States. Operations consistent with the new agreement may be implemented immediately.

The press release of the Department of Transportation on the U.S.-France agreement is available at *www.dot.gov/affairs/dot11101.htm* and for the U.S.-Uganda agreement at *www.dot.gov/affairs/dot05502.htm*.

b. European Court of Justice ruling

On November 5, 2002, the European Court of Justice ("ECJ") ruled in eight cases filed in 1998 by the European Commission against seven EU member states that had signed Open Skies air-transport agreements with the United States, and against the UK on the basis of the 1977 ("Bermuda 2") agreement and subsequent 1995 amendments. In the eight separate but parallel actions (brought against the UK, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany), the ECJ found that the Member States (a) retained the competence to conclude air services agreements with the United States; (b) had infringed the external competence of the Community with regard to computer reservation systems and establishment of air fares on intra-Community routes (except the UK); and (c) infringed the provisions of

the EC Treaty on the "right of establishment" by including in the agreements a "nationality clause" that restricts in practice the rights under each agreement to air carriers owned and controlled by nationals of the parties. At the end of 2002 the United States had bilateral Open Skies agreements with 11 of the 15 member states (all but the UK, Greece, Ireland and Spain) and with six EU candidate countries (the Czech Republic, the Slovak Republic, Romania, Turkey, Malta, and Poland), as well as Switzerland, Iceland and Norway.

Press guidance concerning the reaction of the United States to the ECJ ruling and its effect is provided below.

We have read with interest the court's judgments (eight of them corresponding to the eight cases) and look forward to discussing them with the EU member states and the European Commission.

- The court found against the Commission's contention that EU member states lack competence to conclude air services agreements with the United States.
- The current agreements remain in force as the legal basis for air services between the U.S. and individual EU member states.
- Significantly, the court did not find that the Commission has the sole competence it has long sought to negotiate a comprehensive civil aviation agreement with the United States. Whether the commission will receive a negotiating mandate in the future remains a matter to be decided by the EU member states and the Commission.
- The court did find that in two relatively limited areas—computer reservation systems and pricing on routes within the EU—the member states lack competence to negotiate.

  Our existing bilateral agreements, however, recognize the primacy of EU law in these areas, and the court's ruling should have no significant effect on airline operations.
- The court also held that, in securing rights for airlines owned and controlled by nationals of their country, each of the defendant member states has failed to fulfill its obligations under EU law on the right of establishment.

We are studying this aspect of the ruling and look forward to discussing the implications with our European colleagues.

* * * *

On November 20, 2002, the Office of the Spokesman of the Department of State responded to a question concerning the reaction of the United States to "the European Commission's request that Members denounce their civil aviation agreements with the United States in the wake of the recent rulings by the European Court of Justice."

His answer, set forth below in full, is available at *www.state.gov/r/pa/prs/ps/2002/15329.htm.*

Answer: Our civil aviation agreements with European Union member states provide the legal basis for air services between the U.S. and individual member states. Our Open Skies agreements, in particular, offer both countries' airlines, consumers, shippers, and national economies the enormous benefits of a market-based approach to international civil aviation.

The European Court of Justice decisions do not call for European Union member states to denounce these agreements. The court also ruled against the commission's assertion that member states lack competence to negotiate agreements. Instead, the court found that our agreements are consistent with EU law, except in three areas.

We see no utility in denunciation of our aviation agreements.

The United States is prepared to discuss with European Union member states on a bilateral basis how to accommodate the European Court of Justice's specific legal findings. Such discussions can occur without denunciation.

2. 1955 Hague Protocol

On July 31, 2002, President George W. Bush transmitted to the Senate for advice and consent to ratification 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).

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LETTER OF TRANSMITTAL

The White House, July 31, 2002.

To the Senate of the United States:

I transmit herewith, for Senate advice and consent to ratification, 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). The report of the Department of State, including an article-by-article analysis, is enclosed for the information of the Senate in connection with its consideration of The Hague Protocol.

The Warsaw Convention is the first in a series of treaties relating to international carriage by air. The Hague Protocol amended certain of the Warsaw Convention articles, including several affecting the rights of carriers of international air cargo. A recent court decision held that since 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 had not ratified the Warsaw Convention, there were no relevant treaty relations between the United States and Korea. This decision has created uncertainty within the air transportation industry regarding the scope of treaty relations between the United States and the 78 countries that are parties only to the Warsaw Convention and The Hague Protocol. Thus, U.S. carriers may not be able to rely on the provisions in the Protocol with respect to claims arising from the transportation or air cargo between the United States and those 78 countries. In addition to quickly affording U.S. carriers the protections of those provisions, ratification of the Protocol would establish relations with Korea and the five additional countries (El Salvador, Grenada, Lithuania, Monaco, and Swaziland) that are parties only to The Hague Protocol and to no other treaty on the subject.

A new Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal May 28, 1999 (the "Montreal Convention") is pending on the Senate's Executive calendar (Treaty Doc. 106–45). I urge the Senate to give its advice and consent to that Convention, which will ultimately establish modern, uniform liability rules applicable to international air transport of passengers, cargo, and mail among its parties. But the incremental pace of achieving widespread adoption of the Montreal Convention should not be allowed to delay the benefits that ratification of The Hague Protocol would afford U.S. carriers of cargo to and from the 84 countries with which it would promptly enter into force.

I recommend that the Senate give early and favorable consideration to The Hague Protocol and that the Senate give its advice and consent to ratification.

* * * *

The attached report from the Secretary of State, submitting the Hague Protocol to the President, provided further background on the interrelated conventions and inter-carrier agreements applicable to liability in international air transportation. These include the Warsaw Convention and the Hague Protocol, the 1975 Montreal protocols, the IATA and ATA Inter-carrier Agreements (1997), and the 1999 Montreal Convention. *See Digest 2000* at 670–674. For *Chubb & Son,* also discussed in the report, *see Digest 2001* at 555–565.

All transmittal documents, including the report of the Secretary of State, which includes an article-by-article analysis, are included in S. Treaty Doc. No. 107–14 (2002).

LETTER OF SUBMITTAL

The Secretary of State,
Washington, June 15, 2002.

The President.

* * * *

BACKGROUND

Overview

The 1929 Warsaw Convention has been the subject of several amendments and unsuccessful attempts at amendments over the years. In 1955, The Hague Protocol, which doubled the passenger liability limits and simplified cargo documentation requirements, was adopted and was later ratified by most countries, but not by the United States. In 1971, the Guatemala Protocol again sought to raise the passenger limits, but was ratified by very few States and never entered into force. In 1975, the so-called Montreal Protocols (Nos. 1–4) were adopted. Of these four protocols, the United States is a party only to Montreal Protocol No. 4, which amended the Warsaw Convention as amended by The Hague Protocol, modifying the cargo provisions of that instrument without altering the passenger provisions. In 1999, a new Convention was adopted to eliminate in their entirety the passenger liability limits and modernize the other provisions of the Warsaw Convention and The Hague Protocol. The 1999 Convention is intended ultimately to replace the Warsaw Convention and its various amendments. The United States signed the 1999 Montreal Convention, and it was submitted for Senate advice and consent to ratification in September 2000.

* * * *

7. Chubb & Son, Inc. v. Asiana Airlines

A recent decision by the U.S. Court of Appeals for the Second Circuit in the case of Chubb & Son, Inc. v. Asiana Airlines (214 F.3d 301 (2d Cir. 2000), cert. denied, 121 S. Ct. 2459 (2001)) has highlighted the fragmentation of the Warsaw Convention system and raised uncertainties regarding the liability regime that applies to U.S. carriers in certain situations. The question presented in that case was whether the United States, a party to the Warsaw Convention but not the Hague Protocol or to Montreal Protocol No. 4 at the time the dispute arose, had treaty relations with the Republic of Korea, a party only to The Hague Protocol. The court held that the United States did not have treaty relations with Korea under either The Hague Protocol or the Warsaw Convention, finding that Korea's adherence to The Hague Protocol did not

make Korea a party to the unamended Warsaw Convention, to which the United States was a party.

Although the Chubb decision did not address the 1999 entry into force of Montreal Protocol No. 4 for the United States, it focused industry attention on the difficult question of whether the United States, by reason of its adherence to Montreal Protocol No. 4 became a party to The Hague Protocol and therefore entered into treaty relations under The Hague Protocol with other countries party to that instrument (but not to Montreal Protocol No. 4). U.S. carriers seek certainty regarding the applicability of the Warsaw Convention system in such situations.

If Montreal Protocol No. 4 does not create treaty relations under The Hague Protocol, the United States' treaty relations with the 78 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. Further, under these circumstances, the United States would have no treaty relations under the Warsaw Convention system with Korea and the five other countries which are parties only to The Hague Protocol (El Salvador, Grenada, Lithuania, Monaco, and Swaziland).

The Warsaw Convention of 1929 contains antiquated rules in the area of cargo documentation. Modern air cargo operations bear no resemblance to those of 1929. The cumbersome rules of the Warsaw Convention require much specific information on the air waybill that has no commercial significance today and is irrelevant to modern shippers. The requirements for such extensive documentation:

— Make international air cargo transactions time consuming and inefficient, and drive up their costs;
— Inhibit the free flow of international air commerce; and
— Serve as a barrier to use of electronic information exchanges.

Under the Warsaw Convention, U.S. cargo carriers must comply with commercially unnecessary and outmoded documentation rules or risk non-application by courts of the liability limits for cargo established in the Convention.

Ratification of The Hague Protocol would resolve this problem, ensuring U.S. carriers the benefits of The Hague Protocol's more modern rules relating to documentation, which are critical to the efficient movement of air cargo. It would also provide a clear basis for courts in determining the existence of treaty relations between the United States and foreign countries. Ratification of The Hague Protocol will secure for the United States the application of The Hague Protocol's more modern rules in relations with the 84 countries party to that instrument (but not to Montreal Protocol No. 4), pending the entry into force and widespread ratification of the 1999 Montreal Convention, which is currently awaiting Senate advice and consent.

Upon its entry into force, where applicable, the 1999 Montreal Convention will supersede the Warsaw Convention and all of its protocols, and as a practical matter the voluntary inter-carrier agreements, and will establish modern, uniform liability rules applicable to international air transport of passengers, cargo and mail. That Convention will enter into force when thirty states have consented to be bound by it. As of May 24, 2002, 18 states had deposited with ICAO, the depositary for the Convention, instruments indicating their consent to be bound.

THE PROTOCOL

The primary focus of The Hague Protocol at the time it was negotiated was the doubling of the passenger liability limit to approximately $16,600. However, the 1966 Montreal Inter-carrier Agreement and later the IATA and ATA Inter-carrier Agreements, by which signatory carriers voluntarily waived such limits, have, as a practical matter in most cases, superseded this meager recovery limit. The Hague Protocol improved upon the 1929 Warsaw Convention in several other ways. The principal changes to the Warsaw Convention, many of which were later incorporated into Montreal Protocol No. 4, to which the United States became a party on March 4, 1999, are discussed below. A more detailed review of the provisions of The Hague Protocol follows.

Court Costs. Although the new liability limit for passenger death or injury included in The Hague Protocol is not applicable

in light of the later inter-carrier agreements, a useful related provision of that article (22(4)) adds language to the Warsaw Convention permitting courts to award to the claimant, in accordance with domestic law, added amounts for court costs and other litigation expenses, including attorney's fees, with the proviso that such recovery will not apply where the amount of the damages awarded, excluding court costs, does not exceed any prompt settlement offer made by the carrier.

Documentation. The Hague Protocol streamlines the cumbersome documentation requirements of the Warsaw Convention, particularly in the area of cargo transportation. Article 8 of the Warsaw Convention requires that 17 separate categories of information be included on cargo air waybills. Since much of this information has no commercial significance, modern air waybill forms in use worldwide do not require this information. The Hague Protocol significantly reduces the information required to be included in air waybills to those categories related to the application of the Convention. Moreover, the Warsaw Convention provides that non-compliance with any of several of these documentation requirements would prohibit the carrier from enforcing the liability limits of the Convention. In contrast, The Hague Protocol provides that, with respect to cargo documentation requirements, only the failure to make out an air waybill prior to loading the cargo on board the aircraft, or to give notice as to the liability limitations, would preclude the application of carrier liability limits.

Willful Misconduct. The Warsaw Convention was written in French, with no authentic English text. Article 25 of the Warsaw Convention, as translated from the original French text in the United States, provided that a carrier's liability will not be limited when injury or death is caused by the "willful misconduct" of the carrier or its agent. However, other countries adopted different translations of this term that led to disparate interpretations, and, as a consequence, led to confusion among lawyers and judges attempting to apply the Warsaw Convention. The Hague Protocol replaced the legal standard with a description of the conduct itself that a jury would be able to understand. The Protocol revises the provision to make the carrier's liability without limit when damage results from an act or omission of the carrier or its agent "done

with intent to cause damage or recklessly and with knowledge that damage would probably result." This standard, similar in all substantive respects to the charge to the jury by a New York trial court in a well-known case (Froman v. Pan American Airways, Supreme Court of New York County, March 9, 1953), is recognized as the common law definition of willful misconduct and was not intended to modify the scope of the standard.

* * * *

B. INTERNATIONAL CONVEYANCES

Presidential Permits

On February 7, 2002, and June 17, 2002, the Department of State made available fact sheets describing the application process for Presidential permits for the construction, operation and maintenance of facilities on the U.S.-Canada and U.S.-Mexico borders, respectively. Presidential permits are required under Executive Order 11,423, 33 Fed. Reg. 11,741 (Aug. 16, 1968), as amended, which states that ". . . the proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities connecting the United States with a foreign country." The Canada fact sheet is available at *www.state.gov/p/wha/rls/fs/7895.htm*. The Mexico fact sheet is available at *www.state.gov/p/wha/ci/mx/rel_2001/fs/11148.htm*.

C. NORTH AMERICAN FREE TRADE AGREEMENT

1. Claims under Chapter 11 against the United States

a. Award in Mondev International Ltd. v. United States

On October 11, 2002, an ad hoc tribunal issued a final award dismissing all claims against the United States in *Mondev International Ltd. v. United States of America*. Mondev

International Ltd. ("Mondev") is a Canadian real-estate development corporation. In 1978 a Mondev subsidiary, Lafayette Place Associates ("LPA"), entered into a contract with the City of Boston and the Boston Redevelopment Authority ("BRA") to develop a shopping mall in a dilapidated area in downtown Boston. The first phase contemplated in this tripartite agreement was completed in 1985. The tripartite agreement also granted to LPA a contingent option to purchase from the City an adjoining parcel of land, known as the Hayward Place parcel (the "Hayward Parcel") to develop a second phase. The agreement did not, however, fix the price to be paid for the Hayward Parcel, its exact boundaries or the exact parameters of the rights to be conveyed in the land.

The transfer of ownership of that land did not occur within the time specified in the contract. In February 1991 the mortgagor foreclosed on the mortgage held by LPA with respect to the first phase of the project. LPA brought proceedings in state court against the City and BRA in March 1992. LPA asserted in its amended complaint that it had been unfairly denied the opportunity to buy the Hayward Parcel for the favorable price negotiated in the tripartite agreement. It contended that the City and the BRA had failed to negotiate in good faith and thereby prevented the sale of the property from taking place before LPA's purchase rights expired. LPA also claimed that the BRA had illegally interfered with its proposed sale of its rights to a third party and prevented it from closing. In consequence, LPA claimed to have lost profits it would have received had either sale taken place. LPA won in the trial court, but the Massachusetts Supreme Judicial Court reversed the judgment in 1998, finding, among other things, that the BRA was immune from suit in the case.

In 1999 Mondev submitted its claim to arbitration against the United States under Chapter 11 of NAFTA and the ICSID Arbitration (Additional Facility) Rules on its own behalf, seeking $50 million in damages for losses allegedly suffered by LPA. Mondev alleged that these losses arose from the

decision by the Supreme Judicial Court of Massachusetts and from Massachusetts state law.

The tribunal agreed with the United States that Mondev's NAFTA claims were without merit. The tribunal rejected Mondev's assertions that the acts by the City and the BRA in the 1980s could violate the NAFTA, which did not enter into force until 1994. As a result, the tribunal concluded that "the only arguable basis of claim under NAFTA concerns the conduct of the United States courts in dismissing LPA's claims. Moreover it is clear that Article 1105(1) provides the only basis for a challenge to that conduct under NAFTA."

As to that claim, the tribunal found that the decision of the Massachusetts high court was consistent with international standards of justice. It held further that Massachusetts did not violate international law by making the BRA immune from suit for interference with contractual relations. Finally, it found that Massachusetts did not discriminate against Mondev's subsidiary on the basis of its Canadian ownership. Excerpts below from the tribunal's opinion provide the basis for its holdings on these issues. Footnotes have been omitted.

All U.S. pleadings and the tribunal's rulings in *Mondev* are available at *www.state.gov/s/l/c3439.htm*.

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(1) Relevance of pre-Nafta events

68. The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. The principle is stated both in the Vienna Convention on the Law of Treaties and in the ILC's Articles on State Responsibility, and has been repeatedly affirmed by international tribunals. There is nothing in NAFTA to the contrary. Indeed Note 39 to NAFTA confirms the position in providing that "this Chapter covers investments existing on the date of entry into force of this Agreement as well as

investments made or acquired thereafter". Thus, as the *Feldman* Tribunal held, conduct committed before 1 January 1994 cannot itself constitute a breach of NAFTA.

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70. [E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach. In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPA's claims under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev. The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.

* * * *

75. For these reasons, the Tribunal concludes that the only arguable basis of claim under NAFTA concerns the conduct of the United States courts in dismissing LPA's claims. Moreover it is clear that Article 105(1) provides the only basis for a challenge to that conduct under NAFTA.

* * * *

79. . . . The only question for NAFTA purposes is whether the claimant can bring its interest within the scope of the relevant provisions and definitions.

80. In the present case, in the Tribunal's view, Mondev's claims involved "interests arising from the commitment of capital or other

resources in the territory of a Party to economic activity in such territory" as at 1 January 1994, and they were not caught by the exclusionary language in paragraph (j) of the definition of "investment", since they involved "the kinds of interests set out in subparagraphs (a) through (h)". They were to that extent "investments existing on the date of entry into force of this Agreement", within the meaning of Note 39 of NAFTA. In the Tribunal's view, once an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed. This is obvious with respect to the protection offered by Article 1110: as the United States accepted in argument, a person remains an investor for the purposes of Articles 1116 and 1117 even if the whole investment has been definitively expropriated, so that all that remains is a claim for compensation. The point is underlined by the definition of an "investor" as someone who "seeks to make, is making or has made an investment". Even if an investment is expropriated, it remains true that the investor "has made" the investment.

81. Similar considerations apply to Articles 1102 and 1105. Issues of orderly liquidation and the settlement of claims may still arise and require "fair and equitable treatment", "full protection and security" and the avoidance of invidious discrimination. . . .

* * * *

(2) Interpretation of NAFTA Article 1105(1)

94. There was extensive debate before the Tribunal as to the meaning and effect of Article 1105. The debate included such issues as the binding effect and scope of the FTC's interpretation of Article 1105, given on 31 July 2001, the origin and meaning of the terms "fair and equitable treatment" and "full protection and security" occurring in Article 1105(1), and the extent of the various customary international law duties traditionally conceived as falling within the rubric of the "minimum standard of treatment" under international law.

* * * *

101. In pursuance of these provisions, on 31 July 2001 the FTC adopted, among others, "the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions":

> "B. Minimum Standard of Treatment in Accordance with International Law
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
> 2. The 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.
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."
> Copies of the interpretations were forwarded to the Tribunal by the United States on the day of their issue. Subsequently they were the subject of extended argument both by the Claimant and the Respondent.*

* * * *

120. The Tribunal has no difficulty in accepting that an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105 (1). In light of the FTC's interpretation, and in any event, it is clear that Article 1105 was intended to put at rest for NAFTA purposes a long-standing and divisive debate about whether any such thing as a minimum

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* Mexico and Canada also made submissions under NAFTA Article 1128 arguing, among other things, that the FTC interpretation was binding on the tribunal. *See also Digest 2001* at 568–574.

standard of treatment of investment in international law actually exists.50 Article 1105 resolves this issue in the affirmative for NAFTA Parties. It also makes it clear that the standard of treatment, including fair and equitable treatment and full protection and security, is to be found by reference to international law, i.e., by reference to the normal sources of international law determining the minimum standard of treatment of foreign investors.

121. To this the FTC has added two clarifications which are relevant for present purposes. First, it makes it clear that Article 1105(1) refers to a standard existing under customary international law, and not to standards established by other treaties of the three NAFTA Parties. There is no difficulty in accepting this as an interpretation of the phrase "in accordance with international law". Other treaties potentially concerned have their own systems of implementation. Chapter 11 arbitration does not even extend to claims concerning all breaches of NAFTA itself, being limited to breaches of Section A of Chapter 11 and Articles 1503(2) and 1502(3)(a). If there had been an intention to incorporate by reference extraneous treaty standards in Article 1105 and to make Chapter 11 arbitration applicable to them, some clear indication of this would have been expected. Moreover the phrase "Minimum standard of treatment" has historically been understood as a reference to a minimum standard under customary international law, whatever controversies there may have been over the content of that standard.

122. Secondly, the FTC interpretation makes it clear that in Article 1105(1) the terms "fair and equitable treatment" and "full protection and security" are, in the view of the NAFTA Parties, references to *existing* elements of the customary international law standard and are not intended to add novel elements to that standard. The word "including" in paragraph (1) supports that conclusion. To say that these elements are included in the standard of treatment under international law suggests that Article 1105 does not intend to supplement or add to that standard. But it does not follow that the phrase "including fair and equitable treatment and full protection and security" adds nothing to the meaning of Article 1105(1), nor did the FTC seek to read those words out of the article, a process which *would* have involved amendment rather

than interpretation. The minimum standard of treatment as applied by tribunals and in State practice in the period prior to 1994 did precisely focus on elements calculated to ensure the treatment described in Article 1105(1).

* * * *

125. . . . For the purposes of this Award, the Tribunal need not pass upon all the issues debated before it as to the FTC's interpretations of 31 July 2001. But in its view, there can be no doubt that, by interpreting Article 1105(1) to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party under NAFTA, the term "customary international law" refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for "fair and equitable" treatment of, and for "full protection and security" for, the foreign investor and his investments. Correspondingly the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment and to full protection and security.

* * * *

151. In the Tribunal's opinion, circumstances can be envisaged where the conferral of a general immunity from suit for conduct of a public authority affecting a NAFTA investment could amount to a breach of Article 1105(1) of NAFTA. Indeed the United States implicitly accepted as much. It did not argue that public authorities could, for example, be given immunity in contract vis-à-vis NAFTA investors and investments.

152. But the distinction between conduct compliant with or in breach of NAFTA Article 1105(1) cannot be co-extensive with the distinction between tortious conduct and breach of contract. . . .

153. The function of the present Tribunal is not, however, to consider hypothetical situations, or indeed any other statutory immunity than that for tortious interference with contractual relations. This was the immunity relied on by BRA and upheld by the trial judge and the appeal courts. In that specific context, reasons can well be imagined why a legislature might decide to immunize a regulatory authority, mandated to deal with commercial redevelopment plans, from potential liability for tortious interference. Such an authority will necessarily have both detailed knowledge of the relevant contractual relations and the power to interfere in those relations by granting or not granting permissions. If sued, it will be able to plead that it was acting in good faith and in the exercise of a legitimate mandate—but such a claim may well not justify summary dismissal and will thus be a triable issue, with consequent distraction to the work of the Authority.

154. After considering carefully the evidence and argument adduced and the authorities cited by the parties, the Tribunal is not persuaded that the extension to a statutory authority of a limited immunity from suit for interference with contractual relations amounts in this case to a breach of Article 1105(1). Of course such an immunity could not protect a NAFTA State Party from a claim for conduct which was substantively in breach of NAFTA standards—but for this NAFTA provides its own remedy, since it gives an investor the right to go directly to international arbitration in respect of conduct occurring after NAFTA's entry into force. In a Chapter 11 arbitration, no local statutory immunity would apply. On the other hand, within broad limits, the extent to which a State decides to immunize regulatory authorities from suit for interference with contractual relations is a matter for the competent organs of the State to decide.

155. In the same context Mondev complained that the Massachusetts Act dealing with unfair or deceptive practices in trade and commerce (G.L. Chapter 93A) was held by the trial judge to be inapplicable to BRA notwithstanding that it engaged in the regulation of commercial activity or acted for commercial

motives. But if what has been said above as to the partial immunity of BRA from suit is correct, then *a fortiori* there could be no breach of Article 1105(1) in holding Chapter 93A inapplicable to BRA. NAFTA does not require a State to apply its trade practices legislation to statutory authorities.

156. In reaching these conclusions, the Tribunal has been prepared to assume that the decision to allow BRA's statutory immunity could have involved conduct of the Respondent State in breach of Article 1105(1) after NAFTA's entry into force on 1 January 1994. That assumption may be questioned. The United States' courts, operating in accordance with the rule of law, had no choice but to give effect to a statutory immunity existing at the time the acts in question were performed and not subsequently repealed, once they had concluded that the statute in question did apply. It is not disputed by the Claimant that this decision was in accordance with Massachusetts law, and it did not involve on its face anything arbitrary or discriminatory or unjust, i.e., any new act which might be characterized as in itself a breach of Article 1105(1). In other words, if it was not in December 1993 a breach of NAFTA for BRA to enjoy immunity from suit for tortious interference (and, because NAFTA was not then in force, it could not have been such a breach), it is far from clear how the (*ex hypothesi* correct) decision of the United States courts as to the scope of that immunity, after 1 January 1994, could have been in itself unfair or inequitable. On this ground alone, it may well be that Mondev's Article 1105(1) claim was bound to fail, and to fail whether or not one classifies BRA's statutory immunity as "procedural" or "substantive".

b. Partial award in Methanex Corporation v. United States

On August 7, 2002, a NAFTA arbitration tribunal issued a First Partial Award in *Methanex Corporation v. United States of America*. The tribunal found that Methanex Corporation ("Methanex") had not clearly established the tribunal's jurisdiction. Methanex was given ninety days to file a new pleading, following which the tribunal would decide whether

to proceed to a hearing on a threshold and determinative issue or to hold a hearing on all merits issues.

Methanex, a Canadian marketer and distributor of methanol, submitted a claim to arbitration under the UNCITRAL Arbitration Rules on its own behalf 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 parts 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 $1 billion. 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 its Partial Award, 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.

Excerpts are provided below from the partial award (footnotes omitted). The full text of the award and other documents in the Methanex arbitration are available at *www.state.gov/s/l/c3439.htm*. The award is also published at 14 *World Trade & Arbitration Materials* 109 (2002).

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(1) Partial award

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CHAPTER H—JURISICTION: THE TRIBUNAL'S GENERAL APPROACH

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(8) The Admissibility Challenges

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123. Article 21(1) of the UNCITRAL Arbitration Rules does not accord to the Tribunal any power to rule on objections relating to admissibility. There is no express power; and it is not possible to infer any implied power. The most analogous procedure under the UNCITRAL Arbitration Rules would be a partial award on a preliminary issue tried on assumed facts, pursuant to Article 32 of the UNCITRAL Arbitration Rules13, or possibly a motion to strike (or "strike out") a pleading for failure to state a cause of action, taken from national court procedures. The first procedure, however, does not relate to jurisdiction; it necessarily assumes the exact opposite; and its existence confirms that it would be inappropriate to imply a like procedure into Article 21. The same is true of the second procedure, even if it were permissible to import that court procedure into a transnational arbitration. The contrary position would produce a curious result in an arbitral procedure where the tribunal's awards on the merits are intended to be "final and binding" (Article 32 of the UNCITRAL Arbitration Rules14). As contended by the USA, a decision on "inadmissibility" under Article 21 would be more easily reviewable, *de novo*, before the state courts of NAFTA Parties; and in that event the procedure before the tribunal would be duplicated at least twice over, for no obviously good purpose.

124. Nor is such a power to be found elsewhere in Chapter 11 NAFTA. Where the procedures set out in Chapter 11 are met, the NAFTA Party consents to arbitration; and such consent takes effect under Article II of the UN's 1958 New York Arbitration Convention (Article 1122). There is here no express power to

dismiss a claim on the grounds of "inadmissibility", as invoked by the USA; and where the UNCITRAL Arbitration Rules are silent, it would be still more inappropriate to imply any such power from Chapter 11.

* * * *

126. Conclusion: . . . . This Tribunal has no express or implied power to reject claims based on inadmissibility. Accordingly, we reject the USA's admissibility challenges generally.

CHAPTER J—The USA's JURISDICTIONAL CHALLENGE III: ARTICLE 1101(1) NAFTA

(3) The Ordinary Meaning [of the phrase "relates to"]

135. . . . [U]nder Article 31(1) of the Vienna Convention, the first issue turns on the ordinary meaning of the phrase "relating to". . . .

136. In the Tribunal's view, none of the [suggested] dictionary definitions decide the issue. To a limited extent, they support the USA's reliance on the requirement of a "connection". These definitions imply a connection beyond a mere impact, which is all that the term "affecting" involves on Methanex's interpretation. Nevertheless, we do not consider that this issue can be decided on a purely semantic basis; and there is a difference between a literal meaning and the ordinary meaning of a legal phrase. It is also necessary to consider the ordinary meaning of the term in its context and in the light of the object and purpose of NAFTA and, in particular, Chapter 11 (as required by Article 31(1) of the Vienna Convention).

(4) Context, Object and Purpose

137. For Methanex, the phrase "relating to" should be interpreted in the context of a treaty chapter concerned with the protection of investors; and hence, a broad interpretation is appropriate. Because of its simple application, it is an attractive interpretation; but it is also a brave submission. If the threshold provided by

Article 1101(1) were merely one of "affecting", as Methanex contends, it would be satisfied wherever any economic impact was felt by an investor or an investment. For example, in this case, the test could be met by suppliers to Methanex who suffered as a result of Methanex's alleged losses, suppliers to those suppliers and so on, towards infinity. As such, Article 1101(1) would provide no significant threshold to a NAFTA arbitration. A threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all; and the attractive simplicity of Methanex's interpretation derives from the fact that it imposes no practical limit. It may be true, to adapt Pascal's statement, that the history of the world would have been much affected if Cleopatra's nose had been different, but by itself that cannot mean that we are all related to the royal nose. The Chaos theory provides no guide to the interpretation of this important phrase; and a strong dose of practical common-sense is required.

138. In a legal instrument such as NAFTA, Methanex's interpretation would produce a surprising, if not an absurd, result. The possible consequences of human conduct are infinite, especially when comprising acts of governmental agencies; but common sense does not require that line to run unbroken towards an endless horizon. In a traditional legal context, somewhere the line is broken; and whether as a matter of logic, social policy or other value judgment, a limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable. . . .

139. The approach here can be no different. Methanex's interpretation imposes no practical limitation; and an interpretation imposing a limit is required to give effect to the object and purpose of Chapter 11. The alternative interpretation advanced by the USA does impose a reasonable limitation: there must a legally significant connection between the measure and the investor or the investment. [W]hilst the exact line may remain undrawn, it should still be possible to determine on which side of the divide a particular claim must lie.

140. ***UN New York Convention:*** This interpretation is supported by the reference to the UN 1958 New York Convention in Article 1222 NAFTA, whereby the consent of the NAFTA Party to arbitration under Article 1122(1) is to be treated as satisfying

the requirement of Article II of the New York Convention. Article II(1) of the New York Convention limits the recognition of written agreements to arbitrate differences that may arise "*in respect of a defined legal relationship*": "*Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration*."

It is therefore not sufficient for the purpose of Article II(1) that there be a limitless agreement to arbitrate any future disputes that may ever arise between the parties. More is required for a valid arbitration agreement: the dispute must arise in respect of "*a defined legal relationship*".

* * * *

147. ***Conclusion:*** We decide that the phrase "relating to" in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them, as the USA contends. Pursuant to the rules of interpretation contained in Article 31(1) of the Vienna Convention, we base that decision upon the ordinary meaning of this phrase within its particular context and in the light of the particular object and purpose in NAFTA's Chapter 11. As indicated above, it is not necessary for us to address other submissions advanced by the USA in support of its interpretation based on Article 31(3) of the Vienna Convention (supported by Canada and Mexico).

* * * *

CHAPTER K—ARTICLE 1101(1) NAFTA:
APPLICATION TO THE ASSUMED FACTS

* * * *

154. On the sole basis of [the] assumed facts and inferences, it is doubtful that the essential requirement of Article 1101(1) is met. It could be said with force that the intent behind the measures would be, at its highest, to harm foreign MTBE producers with no

specific intent to harm suppliers of goods and services to such MTBE producers. If so, the measures would *not* relate to methanol suppliers such as Methanex; and accordingly, even with such intent as alleged by Methanex, we would have no jurisdiction to decide Methanex's amended claim. However, Methanex's case does not stop here. It is further alleged that Governor Davis had a broader objective: to favour ADM and the US ethanol industry, to penalise "foreign" MTBE producers *and* "foreign" methanol producers, such as Methanex.

155. The USA responds that this cannot be a credible allegation, for several reasons. First, on the assumed facts, there is no reason why ADM should be concerned with disadvantaging methanol suppliers because ADM's commercial objective is already achieved by the ban on MTBE. Second, on the assumed facts, Governor Davis fulfils his own objectives by penalising MTBE producers; and there is no reason why he should also be concerned with the suppliers to these producers or their products, such as methanol and Methanex. Third, the USA contends that there are strong grounds for inferring that Governor Davis could not have intended to penalise "foreign" methanol producers because there is a substantial US methanol industry equally subject to such intentional harm.

156. In addition, the USA contends that there is no sufficient reason for attributing ADM's motives to Governor Davis. . . .

157. These are powerful points; and if it were possible for us safely to conclude at this stage that there was nothing more to Methanex's case, we would be minded to decide that the requirements of Article 1101(1) were still not met with a sufficiently credible allegation of intent. However, Methanex also alleges that it supplies the majority of methanol in California; that California had no methanol industry of its own; and that as regards MTBE in California, it is essentially Methanex's methanol which provides the relevant "foreign" characteristic which allowed ADM to promote ethanol to Governor Davis to the disadvantage of MTBE. Whatever the position elsewhere in the USA, methanol and Methanex were "foreign" in California; and this, it is suggested, explains why anti-foreigner action could be taken against methanol in California which on its face would appear to hurt US producers of methanol. In short, it is contended, as regards

Governor Davis, that his constituency was the State of California; a "foreign" product was a product foreign to California, which to him, as influenced by ADM, signified methanol produced by Methanex, a "foreign" product produced by "foreigners"; and his intent was to harm Methanex.

158. In these circumstances, we do not consider the case clear enough to determine whether or not Methanex's allegations based on "intent" are sufficiently credible. Accordingly, it is not possible for us to decide, at this stage, that any measure does or does not relate to Methanex or its investments. In particular, decrees and regulations may be the product of compromises and the balancing of competing interests by a variety of political actors. As a result, it may be difficult to identify a single or predominant purpose underlying a particular measure. Where a single governmental actor is motivated by an improper purpose, it does not necessarily follow that the motive can be attributed to the entire government. Much if not all will depend on the evidential materials adduced in the particular case.

159. Accordingly, given the procedural solution on which we have decided below, it would be inappropriate here to develop any further analysis of Methanex's factual case. As we have said already, we do not wish to pre-judge the evidence on disputed issues or indeed further submissions on that evidence; and so far we have heard neither.

c. The Loewen Group, Inc. and Raymond L. Loewen v. United States of America

The Loewen Group, Inc. ("TLGI"), a Canadian corporation involved in the death-care industry, and Raymond L. Loewen, TGLI's chairman and CEO at the time of the events at issue, filed claims under the ICSID Arbitration (Additional Facility) Rules in their individual capacities and on behalf of Loewen Group International, Inc., TLGI's U.S. subsidiary (collectively "Loewen"). Loewen sought damages for alleged injuries arising out of litigation in which the company was involved in Mississippi state courts in 1995–96. Loewen alleged violations of three provisions of NAFTA—the anti-discrimination

principles set forth in Article 1102, the minimum standard of treatment required under Article 1105, and the prohibition against uncompensated expropriation set forth in Article 1110. Loewen requested damages in excess of $600 million. *See* discussion in *Digest 2001* at 623–642.

In January 2002 the United States objected to the continuing competence of the tribunal over the claims of Loewen following a corporate reorganization. The United States argued that as a result of the reorganization, Loewen could no longer satisfy the international law requirement of continuous nationality from the time of injury through the date of the final award, fully applicable to NAFTA Chapter Eleven proceedings.

Excerpts below from the U.S. Memorial on Matters of Jurisdiction and Competence Arising from the Restructuring of Loewen, filed March 1, 2002, provide the U.S. arguments with respect to Loewen's loss of continuous nationality and the requirement for such continuity under international law. The U.S. Reply to the Loewen Counter-Memorial, April 26, 2002, elaborated on the argument that NAFTA does not contain language derogating from the continuous nationality rule under customary international law.

The full text of the pleadings is available at *www.state.gov/s/l/c3439.htm*.

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(1) U.S. Memorial on Matters of Jurisdiction and Competence Arising from the Restructuring of the Loewen Group, Inc., March 1, 2002

For well more than a year, claimant The Loewen Group, Inc. ("TLGI") has been proposing to reorganize all of its business operations under the umbrella of a United States, rather than Canadian, corporate parent in order to reap certain benefits of U.S. corporate citizenship. At the same time, TLGI has been warning its creditors and investors that such a reorganization could result in the loss of the Tribunal's jurisdiction over TLGI's NAFTA claims. On January 2, 2002, TLGI's plan of reorganization became effective and, as a result, the risk of which TLGI warned has finally come to pass.

As part of its reorganization, TLGI ceased to exist as an ongoing business entity and transferred all of its business operations to its former United States subsidiary, The Loewen Group International, Inc. ("LGII"), which is now called the "Alderwoods Group, Inc." Fully aware that a complete transformation of TLGI into a United States corporation would destroy its NAFTA claims, TLGI has engaged in an elaborate corporate shell-game in an effort to create a dual illusion: (1) that Loewen remains a viable Canadian enterprise, and (2) that the NAFTA claims are still owned by a Canadian national. Neither, however, is true. As a result, this Tribunal now lacks jurisdiction over TLGI's claims.

* * * *

I. THE TRIBUNAL IS WITHOUT JURISDICTION TO AWARD ANY RELIEF TO TLGI BECAUSE TLGI IS NO LONGER A "DISPUTING PARTY" TO THIS ARBITRATION

Arbitration under NAFTA Chapter Eleven, like other forms of arbitration, requires the parties to remain in existence during the pendency of their dispute. . . .

To be a "disputing party" under NAFTA Chapter Eleven, a claimant must be a "disputing investor" which, in turn, requires (inter alia) that the claimant be a national of a foreign Party or "an enterprise constituted or organized under the law" of that foreign Party.[18] As a consequence of the Loewen Group's restructuring, TLGI has ceased to exist as an entity properly constituted or organized under the relevant Canadian law and, therefore, is no longer a "disputing party" to this arbitration.

* * * *

In short, despite Loewen's efforts to maintain the illusion of TLGI's continued existence, TLGI is, in reality, completely defunct

[18] NAFTA Articles 201, 1139.

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as a matter of both fact and applicable law.[21] It has divested itself of all meaningful assets, carries on no business operations and, indeed, has no officers, directors or employees who could do so. Because TLGI is thus no longer in good standing as a corporation duly organized under Canadian law, it is no longer a "disputing party" to this arbitration and, therefore, can assert no claim over which this Tribunal ha jurisdiction.

* * * *

II. TLGI's CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE NOW OWNED BY A NATIONAL OF THE UNITED STATES

Under the terms of the NAFTA and well-established principles of international law, no person or entity can maintain an international claim against its own State. TLGI concedes as much by having gone to great lengths to conceal Alderwood's ownership of the NAFTA claims behind a Canadian facade. Despite this elaborate (albeit transparent) gamesmanship, TLGI cannot disguise the fact that the true ownership of its NAFTA claims, along with all of its other assets, has devolved to the Alderwoods Group, a U.S. national with no rights to assert any NAFTA claims against the United States.

A. The NAFTA Claims Must Be Continuously Owned by a Non-U.S. National Through the Date of the Final Award

As this Tribunal has acknowledged, Article 1131(1) of the NAFTA requires it to "decide the issues in accordance with the provisions of the NAFTA and applicable rules of international law." Decision on Jurisdiction ¶ 50. Among the applicable customary international

[21] See L. Sohn & R. Baxter, Convention on the Responsibility of States for Injuries to Aliens (Draft No. 12 with Explanatory Notes, Apr. 15, 1961) ("Harvard Draft Convention"), Explanatory note to art. 21(3)(d) at 181 ("A juristic person, unlike a natural one, requires the operation of some legal system to endow it with existence.").

law rules is the well-established principle of "continuous nationality," which provides that,

> from the time of the occurrence of the injury *until the making of the award*, the claim must continuously and without interruption have belonged to a person or to a series of persons . . . not having the nationality of the state against whom it is put forward.

I *Oppenheim's International Law* (R. Jennings & A. Watts eds., 9th ed. 1992) 512–513 (emphasis added). See also, Ian Brownlie, *Principles of Public International Law* 482–83 (5th ed. 1998).[22] The rule establishes a time frame for assessing a claimant's nationality starting with the date of injury (*dies a quo*) and ending with the date of the award (*dies ad quem*). To recover, a claimant cannot become a national of the respondent State, or transfer beneficial ownership of the claim to a national of that State, at any time during this period. If such a change in nationality does occur, the "right to press [that] claim is cut off completely, whether the individual has not yet acted or is actively pressing his claim." Sohn & Baxter, Harvard Draft Convention, art. 22(8) & note, at 187, 197.

Application of this rule in State practice is well-documented.[23] Consistent with this State practice, the rule has also been applied

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[22] According to these and a number of other authorities, any change in nationality, even to a State other than the respondent State, will result in the denial of the claim. See Oppenheim's International Law at 512–13 ("the claim must continuously and without interruption have belonged to a person or to a series of persons . . . having the nationality of the state by whom it is put forward"); Brownlie, Principles of Public International Law at 482 (quoting same). The Tribunal need not address whether this broader principle applies to NAFTA Chapter Eleven claims, because Loewen's reorganization has resulted in a transfer of TLGI's claims to a national of the respondent State. Moreover, this is not a case of a coerced or involuntary change in nationality, such as one brought about by State succession. See Brownlie, Principles of Public International Law at 482. In the present case, Loewen voluntarily chose to become a U.S. national.

[23] See, e.g., Bases of Discussion for the Conference Drawn up by the Preparatory Committee, League of Nations Doc. C.75.M.69.1929.V. at

repeatedly by international tribunals to deny claims that have changed nationality during the course of proceedings. See e.g., Joseph Kren v. Yugoslavia (U.S. Int'l Cl. Comm'n), [1953] I.L.R. 233, 236 (1957) ("there is ample authority under the decisions of international tribunals that a claim must have a continuous national character from the date of its origin to the date of settlement.").[24]

140–45 (1929), reprinted in 2 S. Rosenne, League of Nations Conference for the Codification of International Law [1930] 423, 562–67 (1975) (observing that many States—including Australia, Egypt, Germany, Great Britain, India, Japan, New Zealand and South Africa—agree that the injured person must retain the nationality of the claimant State through the date of the award); id. at 567 ("[a]ccording to the opinion of the majority [of States that responded to the Committee's request for information], 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"); 5 G. Hackworth, Digest of International Law 805 (1943) (where an American claimant Ebenezer Barstow died after his claim was presented to the Japanese government, the U.S. declined to continue to espouse the claim because the decedent's wife, who was the new owner of the claim, was Japanese); F. 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 the claims of three claimants, "the claimants having acquired American nationality" during the 14 years between the date the claims were first filed and the date the memorial was filed); U.S. Dep't of State, Claims Circular: General Instructions for Claimants, reprinted in S. Doc. No. 66–67, at 8 (1919) ("the Government of the United States, as a rule, declines to support claims that have not belonged to [American citizens] from the date the claim arose to the date of its settlement.'"); 60 French and American Claims Commission, 1880–1884, Records of Claims (Gibson Bros., Washington, D.C., undated) (reproducing arguments of the U.S. and France in Chopin case) (the French and U.S. Governments agreed that the continuous nationality requirement extends to the date of award).

[24] See also, e.g., Eschauzier, (Gr. Brit.-Mex. Cl. Comm'n of 1931) 5 R.I.A.A. 207 (dismissing a 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. Feller, The Mexican Claims Commissions: 1923–1934 at 97 (1935) (denying 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"); Chopin (Fr.-U.S. Mixed Cl. Comm'n of 1880), reprinted in 2 J. Moore, International Arbitrations 1150 (1898)

As the U.S. Foreign Claims Settlement Commission explained in American Security and Trust Co. v. Hungary (U.S. For. Cl. Settlement Comm'n 1957), reprinted in 26 [1958-II] I.L.R. 322 (1963), there is "a long list of authorities who have expressed" the view that, "'up to the last moment of its activities, [a Tribunal] remains concerned with the question on whose behalf the claim is prosecuted and to whom the proceeds of an award will flow. . . .'" (quoting Administrative Decision No. V, Decisions and Opinions 145, 164 (U.S.-Germany Mixed Claims Commission)).

Leading commentators also agree that the continuous nationality requirement extends throughout the proceedings to the date of the final award. As Professor Brownlie observes, "the majority of governments and of writers take the date of the award or judgment as the critical date."[25] See also F.V. Garcia-Amador, et al., Recent Codification of the Law of State Responsibility for Injuries to Aliens 82 (1974) ("[T]he predominant opinion both in diplomatic practice and in international case-law is unquestionably" that the continuous nationality rule applies through the date of the award.).[26] Professor Christopher Greenwood, whose third written opinion in this proceeding is attached hereto at Tab B, also agrees that, "from the date of the original injury to the date on which the award or judgment is given," an international claim "must be

("The commission, holding that the treaty requirement as to the claimant's citizenship applied as well to the time when the claim was sought to be collected as to the time when it arose, uniformly decided that it had no jurisdiction to award anything against the United States in favor of a person who was not at the time of the award a citizen of France[.]"); Gribble (Brit.-Am. Mixed Cl. Comm'n, 1872), Report of Robert S. Hale, Esq., Agent and Counsel of United States, [1873, Part II, Vol. III] U.S. Foreign Relations 14 (1874) (commission was unanimous that the claimant's naturalization as a U.S. citizen after the filing of his memorial deprived him of standing); see also Biens Britanniques au Maroc Espagnol—Benchiton (Gr. Brit. v. Spain), 2 R.I.A.A. 615, 706 (1924) ("the claim must remain national up to the time of the judgment, or at least up to the time of the termination of the argument relating thereto").

[25] Brownlie, Principles of Public International Law at 484.

[26] See also, M. Shaw, International Law 565 (4th ed. 1997); Sohn & Baxter, Harvard Draft Convention, art. 23(7) at 200.

owned continuously by a national or nationals of the claimant State and must not be owned at any part of this period by a national of the respondent State." Greenwood Third Op. at ¶ 21.

NAFTA Chapter Eleven does not derogate from this established principle.[27] To the contrary, the requirement of continuous nationality is consistent with various of the Agreement's provisions. Indeed, the dispute resolution provisions of Chapter Eleven, on their face, pertain to "Disputes between a Party and an Investor of *Another* Party" (NAFTA Section B) (emphasis added), thus expressly incorporating the basic requirement that a claimant have a nationality other than that of the respondent State. See Feldman v. United Mexican States, Interim Decision on Preliminary Jurisdictional Issues, 40 I.L.M. 615, 620 at ¶ 34 (2001) ("the definition in Article 1139 of the 'investor of a Party' . . . , in the scope of application of Article 1117(1), refers to an investor of a Party *other than the one in which the investment is made*") (emphasis added). This basic requirement is similarly reflected in Article 1117(4), which specifies that an "investment" cannot assert a claim under the Chapter, but must instead rely upon an investor of *another* Party to bring a claim on its behalf.

The award enforcement provisions of Chapter Eleven also accord with a continuous nationality requirement through the time of the award. For example, Article 1136(5) provides that a "Party whose investor was a party to the arbitration" can invoke the procedures of NAFTA Chapter Twenty and seek a decision from a panel established by the Free Trade Commission enforcing the award against the "disputing Party." The procedure established by this provision, which is analogous to a traditional espousal claim, assumes a continuing connection between the investor and the non-disputing Party through the time of the award, so as to allow that Party to pursue a State-to-State arbitration on behalf of the investor. Without such a requisite connection, no Party would

[27] See Greenwood Third Op. at ¶ 27 (observing that, while "States are, of course, free to waive or vary the [continuous nationality] doctrine by treaty should they so wish[,] [t]here is no indication that the parties to NAFTA intended to do anything of the kind").

have an interest in seeking enforcement on the investor's behalf.[28] Similarly, a "disputing investor" may seek enforcement of an award on its own under the ICSID Convention, the New York Convention or the Inter-American Convention. See NAFTA Article 1136(6). The term "disputing investor," however, is specifically defined in Article 1139 to mean "an investor that makes a claim under [Chapter Eleven] Section B." As discussed above, Articles 1116 and 1117 prohibit a claimant investor from possessing the same nationality as the respondent Party. Article 1136(6) carries this requirement forward through the enforcement stage. Thus, each NAFTA Party contemplated enforcement of Chapter Eleven awards against itself only by investors of *another* NAFTA Party.

Even in the absence of these provisions, the continuous nationality rule would continue to apply to Chapter Eleven claims. As this Tribunal has recognized, "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 an intention to do so." Decision on Jurisdiction ¶ 73 (citing Elettronica Sicula SpA (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 at 42); see also Sambiaggio Case (Italy-Venez. Mixed Cl. Comm'n of 1903), 10 R.I.A.A. 499, 521 ("something in derogation of the general principles of international law . . . would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation").[29] If the Parties to the NAFTA

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[28] See also NAFTA Articles 1116 & 1117 (allowing for claims only by an "investor of a Party" against "another Party."); NAFTA, Article 1115 (purpose of Section B is to establish "a mechanism for the settlement of investment disputes that assures . . . equal treatment among investors of the Parties in accordance with the principle of *international reciprocity*. . . .") (emphasis added).

[29] Likewise, the NAFTA Chapter Eleven tribunal in Feldman v. Mexico considered the effect of the claimant's dual nationality on the claim, a matter on which Chapter Eleven is silent. The tribunal not only "deem[ed] it appropriate to recall" international law principles "in matters of standing in international adjudication or arbitration or other form of diplomatic protection," 40 I.L.M. at 619 ¶ 30, but it also checked the result "obtained under general principles of international law . . . against the NAFTA legal framework," id. at 620 ¶ 33, and found that the NAFTA could be interpreted consistently with such principles. Id. at 621 ¶ 36.

had intended to derogate from the longstanding requirement of continuous nationality through the date of award, they could easily have included language to that effect. It is significant that they did not.

Indeed, other international agreements have contained express provisions modifying the requirements of the continuous nationality rule. For example, the Claims Settlement Declaration between the United States and Iran under the Algiers Accords, which establishes the jurisdiction of the Iran-United States Claims Tribunal in disputes outstanding as of January 19, 1981, requires a claim to be "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."[30] The Claims Settlement Declaration thus specifically modifies the end point (*dies ad quem*) of the continuous nationality rule. See Development Resources Corp. v. Iran, 25 Iran-U.S. Cl. Trib. Rep. 20, 28 (1990). Similarly, the Agreement of 1964 between the United States and Yugoslavia, which resolved disputes arising between July 19, 1948 and November 5, 1964, defines "claims of nationals of the United States" as "claims which were owned by nationals of the United States on the date on which the property . . . was nationalized . . . and on the date of the Agreement."[31] Thus, in addition to specifically modifying the *dies ad quem*, the Yugoslav Agreement appears to abandon the requirement of continuity of ownership throughout the relevant period. In another example, the Agreement of 1963 between the United States and Bulgaria modified both the starting and ending dates for the continuous nationality rule. The Bulgaria Agreement contains three different

[30] Article VII(2), Declaration of the Government 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"), entered into Jan. 19, 1981, reprinted in 20 I.L.M. 230, 233 (1981).

[31] Article I, Agreement Between the Government of the United States of American and the Government of the Socialist Federal Republic of Yugoslavia Regarding Claims of United States Nationals, dated November 5, 1964, entered into January 20, 1965, reprinted in 16 U.S.T. 1 [TIAS 5750] (1965).

definitions of the term "claims of nationals of the United States." Depending on the type of claim, the term refers to claims owned by U.S. nationals from a certain starting date "and continuously thereafter until filed with the Government of the United States of America."[32] The NAFTA, in contrast, contains no such provisions.

Moreover, permitting claims to proceed even after the holder of the claim has become a national of the respondent State would contravene principles of international reciprocity and the sovereignty of each of the Parties to the Agreement, which are fully recognized in the NAFTA's investor-State dispute resolution provisions.[33] It would be a significant affront to the intentions of the Parties—and, indeed, the sovereignty of each of those Parties—for a Chapter Eleven tribunal to require a NAFTA Party to pay an award to an enterprise that is owned or controlled by its own nationals. As the United States Supreme Court has explained, [i]ndependently of the express provisions of the treaty, it could not reasonably be urged that the award should inure to the benefit of citizens of the United States. It would be a remarkable thing, and we think without precedent in the history of diplomacy, for the government of the United States to make a treaty with another country to indemnify its own citizens for injuries received from its own officers. Burthe v. Denis, 133 U.S. 514, 520–21 (1890) (holding that claimants claiming against the United States before the French-American Claims Commission needed to be citizens of France both at time of presentment of the claim and "of judgment thereon").

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[32] Article I(2), Agreement Between the Government of the United States of America and the Government of the People's Republic of Bulgaria Regarding Claims of United States Nationals and Related Financial Matters, dated July 2, 1963, entered into July 2, 1963, reprinted in 14 U.S.T. 969, 970 [TIAS 5387] (1963).

[33] See, e.g., NAFTA Articles 1101(4), 1115; 1117(4); see generally NAFTA Chapter Twenty.

* * * *

B. Alderwoods, a U.S. National, Is Now the Owner of the NAFTA Claims

The purpose and effect of Loewen's reorganization is clear: to transform Loewen into a U.S. corporate family led by the Alderwoods Group, via the dissolution of TLGI and the transfer of its assets to Alderwoods. . . .

* * * *

1. TLGI Has Assigned Away its NAFTA Claims

* * * *

Although TLGI purports to retain legal title to the NAFTA claims, it is the equitable, not the nominal, owner that determines the nationality of the claim in circumstances like those present here. Indeed, it is well-established that an international claim "terminates if the *holder of the beneficial interest* in the claim becomes a national of the . . . [respondent] State", even if the allegedly "injured alien" remains a foreign national. Sohn & Baxter, Harvard Draft Convention, art. 22(8) (emphasis added).[35] For this reason, international tribunals generally determine the nationality of claims by "look[ing] to the citizenship of the real claimant and equitable owner rather than of the nominal claimant and ostensible owner." Edwin M. Borchard, Diplomatic Protection of Citizens Abroad 666 (1915).

Numerous international authorities support the principle that "the national character of a claim must be tested by the nationality of individuals holding a beneficial interest therein rather than by the nationality of the nominal or record holders of the claim." American Security and Trust Co. v. Hungary (U.S. For. Cl. Settlement Comm'n 1957), reprinted in 26 [1958-II] I.L.R. 322–23 (1963) (where the trustee presenting the claim was a U.S. citizen, but its beneficiaries were not, the commission rejected the claim,

[35] See also Oppenheim's International Law at 514 ("it will usually be the nationality of the holder of the beneficial interest which will be the determining factor for purposes of an international claim").

noting that "[p]recedents for the foregoing well-settled proposition are so numerous that it is not deemed necessary to document it with a long list of authorities"); Binder-Haas v. Yugoslavia (U.S. Int'l Cl. Comm'n 1953), reprinted in [1953] I.L.R. 236–38 (1957) (holding that "ostensible owner" of shares was not entitled to bring a claim on his own behalf and looking to the nationality of the beneficial owners). Contemporary commentators have confirmed the continuing validity of this proposition. See Brownlie, Principles of Public International Law, at 482–83 (following American Security and Trust Co.). As Professor Greenwood explains, "[t]here is a general consensus that, in determining the nationality of a claim, international law looks to the substance, not the form." Greenwood Third Op. at ¶ 5.

For example, in the Coleman case, the British-American Mixed Claims Commission disallowed a claim against the United States where the nominal British claimant had assigned the beneficial interests in his claim to an American company.[36] "The claim was prosecuted before the commission by [the American assignees] at their own cost and for their own benefit, though in the name of Charles Coleman."[37] The Commission accepted the United States' contention that the Commission had lost jurisdiction over the claim because "the case was in substance one between the United States and its own now citizens . . . and was not . . . a bona-fide controversy between a subject of Great Britain and the government of the United States as the treaty contemplated."[38]

In the Lederer case, the Great Britain-Germany Mixed Arbitral Tribunal refused a claim, originally notified by a British national

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[36] Charles Coleman v. United States (Am.-Brit. Mixed Cl. Comm'n 1872), reprinted in Report of Robert S. Hale, Esq., Agent and Counsel of United States, [1873, Part II, Vol. III] U.S. Foreign Relations 98–100 (1874). See also J. Ralston, The Law and Procedure of International Tribunals (1926) (1973 ed.) at 175 (explaining that the Commission "in the Coleman case refused an award to American assignees of a claim against the United States which was originally British, apparently considering with propriety that the commission lost jurisdiction, such a transfer to citizens of the respondent nation being made").

[37] Coleman at 99.

[38] Id. at 100.

against Germany but pursued by executors of his estate after his death, to the extent that "compensation would be ultimately awarded to a German beneficiary" of the decedent's estate.[39] The tribunal reasoned that 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."[40]

Similarly, in Parrot's Case, 3 Moore's, International Arbitrations 3009 (1898), the U.S.-Mexico Claims Commission denied a claim brought by a U.S. citizen against Mexico based upon the action of Mexican courts in disposing of a lawsuit filed by Parrot. The Commission found that Parrot had assigned all of his property and "all his credits and claims, except such claims as he might have against the Government of Mexico" to his Mexican creditors. Despite his specific reservation of claims against Mexico, the Commission decided that Parrot had "no valid claim" relating to the lawsuit after the assignment. Id. The Iran-U.S Claims Tribunal, as well, regularly considers the beneficial owner, rather than the record owner, of property in certain matters of jurisdiction where evidence indicates that the beneficial owner is "in reality the true owner of the property." Reza Nemazee, Award 575–4–3 at ¶ 54; see also Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal 111 (1998) ("Consistent with historical claims practice, the Tribunal has favored beneficial over nominal ownership for the purposes of [Article VII of the Claims Settlement Declaration].") (footnote omitted).

* * * *

2. Alderwoods Is the Real Owner of the NAFTA Claims Because Nafcanco Is Not an Independent Entity

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[39] Exors. of F. Lederer v. German Government (Interlocutory Decision) (Gr. Brit.-Germ. Mixed Arbitral Tribunal 1923) in Recueil des Décisions des Tribunaux Arbitraux Mixtes 762, 765 (1924) (the tribunal did not consider itself "empowered by the Treaty to go in [its] award further than is necessary to ensure the compensation due to the British beneficiaries").

[40] Lederer (Decision on an Application under the Provisions of Rule 40) in id. at 766, 770.

International tribunals have cast a particularly wary eye on transfers of claims to corporate entities, like Nafcanco, that appear to have been created solely for the purpose of establishing or maintaining the requisite nationality for pursuing the claim. *See* 8 Marjorie M. Whiteman, Digest of International Law 1270–1272 (1967) (collecting cases). As Professor Brownlie has explained, "international law has a reserve power to guard against giving effect to ephemeral, abusive and simulated creations." Brownlie, *Principles of Public International Law* at 489; see also Restatement (Third) of the Foreign Relations Law of the United States § 213 n. 2 (1986) ("[A] respondent state is entitled to reject representation by the state of incorporation where that state was chosen solely for legal convenience, for example as a tax haven, and the corporation has no substantial links with that state, such as property, an office or commercial or industrial establishment, substantial business activity, or residence of substantial shareholders."). In such circumstances, customary international law recognizes a limitation to the general principle that a corporation has a legal identity separate from that of its shareholders. As the International Court of Justice acknowledged in *Barcelona Traction*,

> the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, *to prevent the misuse of the privileges of legal personality*, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or obligations. . . . [T]he process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law.

Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 39 (Judgment Feb. 5) (emphasis added); *see also Autopista Concesionada de*

Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, (Decision on Jurisdiction Sept. 27, 2001) at 116, 122 (where, in determining the "foreign control" required for jurisdictional purposes under the Convention, the tribunal found it had "to review the concrete circumstances of the case without being limited by formalities" to ascertain whether "the purposes of the Convention have [ ] been abused," e.g., whether a "corporation of convenience exert[ed] a purely fictional control for jurisdictional purposes").

In addition, international authorities fully support the rejection of international claims "of foreign juristic persons in which nationals of the *respondent State* hold the controlling interest," particularly in "the case of a juristic person whose [foreign] nationality is more fictitious or nominal than real." F.V. Garcia-Amador, et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* 83 (1974) (emphasis added); *see also* Revised Draft Articles on International Responsibility of the State for Injuries Caused in it Territory to the Person or Property of Aliens, art. 23(4), in id. at 132 ("A State may likewise not bring a claim on behalf of foreign juristic persons in which nationals of the respondent State hold the controlling interest."). While the Harvard Draft Convention on State Responsibility, like NAFTA Chapter Eleven, generally bases the nationality of a juridical entity on the law under which it is incorporated, it nevertheless would preclude a corporation from presenting a claim "if the controlling interest in that [juridical] person is in nationals of a State alleged to be responsible or in an organ or agency of that State." Sohn & Baxter, Harvard Draft Convention, art. 22(7) at 187; *see also* id. art. 23(4) at 199.[43]

Consistent with this authority, the U.S.-Mexican Claims Commission in the claim of *Monte Blanco Real Estate Corp. (U.S. v. Mexico)* denied the claim of Monte Blanco because it found that Mexican nationals had formed the claimant corporation for

[43] As an explanatory note to the Harvard Draft Convention makes clear, "[t]he test to be applied is one of control, not of ownership." Sohn & Baxter, Harvard Draft Convention, Explanatory note to art. 22(7) at 196.

the sole purpose of seeking diplomatic protection from the United States against Mexico. The Commission explained:

> Claimant urges that it is an American national; that a corporation is a distinct personality apart from its stockholders, and that it is recognized as a separate entity in American law. However, even if the stock of the claimant company were owned by American nationals, such ownership would not be sufficient to justify the claim's espousal by the American Government if it were merely a colorable ownership concocted for the purpose of protecting non-American interests.

Monte Blanco Real Estate Corp., Decision No. 37-B (Am.-Mex. Cl. Comm'n of 1942), *reprinted in* Report to the Secretary of State 191, 195 (1948).

A similar result was obtained in a case involving the sinking of the "I'm Alone" (a British Ship of Canadian registry) by the United States. *S.S. "I'm Alone" (Can. v. U.S.)*, (Special Agreement, Convention of Jan. 23, 1924) 3 R.I.A.A. 1610, 1617–18 (1935). At the time of sinking, the "I'm Alone" was formally registered in Nova Scotia and owned by a Canadian company, all of whose shareholders were nominally British. However, despite the ostensible Canadian and British ownership of the "I'm Alone," the United States argued that the ultimate American owners of the shipping company "abused the privilege of both Canadian registry and Canadian incorporation."[44] The Commission agreed, finding that the ship was "*de facto* owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who

[44] Answer of the Government of the United States of America to the Claim of His Majesty's Government in Canada in Respect of the Ship "I'm Alone," Publications of the Department of State, Arbitration Series No. 2(3), at 1–2 (1931).

* * * *

employed her for the [illicit] purposes mentioned." *Id.* at 1617–18. Accordingly, the Commission denied the claim even though the relevant convention merely required that the ship be a British flag vessel in order for a claim to be presented. See Convention of January 23, 1924 Between the United States and Great Britain to Aid in the Prevention of Smuggling of Intoxicating Liquors into the United States, art. 4, reprinted in, 3 R.I.A.A. 1611–13.

Like the purportedly Mexican corporation in *Monte Blanco* and the Canadian-registered *I'm Alone*, Nafcanco was "concocted" for the sole purpose of masking an American interest behind "colorable" foreign ownership. For all practical purposes, Nafcanco is a part of Alderwoods and Alderwoods is in *de facto* ownership and control of the NAFTA Claims.

* * * *

III. TLGI'S ARTICLE 1117 CLAIM SHOULD BE DISMISSED BECAUSE TLGI NO LONGER "OWNS OR CONTROLS" LGII

NAFTA Article 1117 allows "[a]n investor of a Party" to make a claim "on behalf of an enterprise of another Party . . . that the investor owns or controls directly or indirectly" for damages suffered by the investment enterprise. TLGI has brought such a claim against the United States on behalf of its former subsidiary, LGII. However, as a result of the reorganization, TLGI no longer "owns or controls" that enterprise. Indeed, it has no connection at all to Alderwoods or the rest of the Alderwoods Group.[46] Therefore, TLGI cannot maintain a claim on behalf of LGII.

As the United States explained during the jurisdictional phase of this proceeding, Article 1117 makes clear the intention of the NAFTA Parties that ownership or control of an investment enterprise must be ongoing in order for an investor to maintain a

[46] See, e.g., Disclosure Statement at 75–76 (U.S. App. at 1455–56) ("Immediately following the consummation of the Restructuring Transactions, TLGI will have . . . no relationship to Reorganized LGII or any of its subsidiaries other than as a result of the transactions relating to the NAFTA Claims.").

claim on behalf of that enterprise.[47] Without such ongoing ownership or control, a claimant has no authority to speak on behalf of the enterprise (e.g., for purposes of settlement of the claim, or otherwise in the course of the proceedings), to consult with the enterprise, or obtain documents or other information from the enterprise. Indeed, it would be nothing short of absurd to allow an investor to advance an international claim on behalf of an enterprise owned or controlled by someone else. As Chapter Eleven makes clear, the NAFTA Parties contemplated claims on behalf of investments only by those investors who maintained such authority throughout the entire proceedings. Thus, by voluntarily surrendering its ownership of LGII/Alderwoods, TLGI has also surrendered its right to assert a claim on that enterprise's behalf.

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d. ADF Group Inc. v. United States

ADF Group Inc. ("ADF"), a Canadian corporation that designs, engineers, fabricates, and erects structural steel, filed a claim under the ICSID Arbitration (Additional Facility) Rules on its own behalf and on behalf of ADF International Inc., its Florida subsidiary. ADF claimed damages for alleged injuries resulting from the federal Surface Transportation Assistance Act of 1982 and the Department of Transportation's implementing regulations, which require that federally-funded state highway projects use only domestically produced steel. At issue in the case was a procurement contract between the Department of Transportation of the State of Virginia and Shirley Contracting Corporation, and a sub-contract between Shirley and ADF International. The Virginia project was partially funded by the Federal Highway

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[47] See U.S. Jurisdictional Mem. at 91–92; U.S. Response on Jurisdiction at 92–94; see also NAFTA Article 1117 (allowing investors to make claims on behalf of an enterprise that "the investor owns or controls directly or indirectly"); Article 1135(2) (directing payment, for Article 1117 claims, to the enterprise); Article 1136 (providing for enforcement of any award under Article 1117 only by a disputing party, not by an investment).

Administration, which required a "Buy America" provision to be included in the Virginia contract with Shirley. ADF claimed $90 million in damages for violations of the national treatment requirement of Article 1102, the minimum standard of treatment requirement of Article 1105(1), and the prohibition against performance requirements contained in Article 1106. *See* discussion in *Digest 2001* at 611–623.

The United States filed a Rejoinder on Competence and Liability on March 29, 2002. Following a hearing on April 16–18, 2002, the United States made two post-hearing submissions, dated June 27 and August 1, 2002. Excerpts below from the Rejoinder provide the U.S. view that the action complained of in this case constituted "procurement by a Party." Excerpts from the post-hearing submissions focus on the interpretation of NAFTA Article 1105(1). In its discussion, the United States explains its disagreement with dicta in an award in *Pope & Talbot v. Canada* concerning the Free Trade Commission interpretation of that provision (*see also Mondev* Award, supra). The tribunal in that case awarded damages to the U.S. claimant in an award of May 31, 2002; *see also Digest 2000* at 674–694.

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(1) Rejoinder on Competence and Liability, March 29, 2002

* * * *

ADF errs when it argues that "procurement *by a Party*" is not at issue here because "[t]here was no procurement or procurement contract between the U.S. and any supplier of goods and services." Reply ¶ 43. ADF's contention is based on a distinction between federal and state governments that finds no support in the text of Article 1108's exclusion for "procurement by a Party."

The Parties to the NAFTA are three States under international law: Canada, the United States of America and the United Mexican States. The State in international law is responsible for the ensemble of governmental activity within the territory of the State, regardless of how governmental authority is divided within the State under

its internal law. As Professors Patrick Daillier and Alain Pellet note in their recent treatise on public international law:

> [A State's] "government," from the perspective of public international law, includes not only the executive authorities of the State, but the ensemble of its "public powers." It is the entirety of the internal political, judicial and administrative order that is envisaged.[8]

Article 4(1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission last summer, states this accepted principle of customary international law as follows:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and *whatever its character as an organ of the central government or of a territorial unit* of the State.[9]

The use of the term "Party" in Chapter Eleven reflects an understanding that is consistent with that of the State in international law: the term "Party" encompasses state, federal and local governments, whether acting independently or in concert. Article 1102(1), for example, requires that a "Party" accord national treatment with respect to investments. As Article 1102(3) explicitly makes clear, however, the "Party" that bears that national treatment obligation includes the states and provinces.[10] Similarly, although other obligations in Chapter Eleven are also imposed on

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[8] Nguyen Quoc Dinh, Droit international public 413 ¶ 272 (Patrick Daillier & Alain Pellet eds., 6th ed. 1999).

[9] Report of the International Law Comm'n, 53rd sess., U.N. Doc. A/56/10, at 84 (2001) (emphasis added).

[10] *See* NAFTA art. 1102(3) ("The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to the investments of investors, of the Party of which it forms a part.").

a "Party," Article 1108(1) sets forth varying exceptions to those obligations for federal, state and local measures—exceptions that would be unnecessary if the term "Party" did not include states, provinces, localities and other governmental subdivisions.[11] Contemporaneous statements made by Canada in implementing the NAFTA confirm this view: in its Statement of Implementation, Canada observed that "section A [of Chapter Eleven] covers measures by *a Party (i.e., any level of government in Canada)*."[12]

Thus, as noted in the U.S. Counter-Memorial, while distinctions between different levels of government *are* expressly relevant to the scope of Chapter Ten of the NAFTA, such distinctions are not relevant to the scope of Article 1108's exclusion for "procurement by a Party." By the use of the term "Party," Articles 1108(7) and 1108(8) make clear that any form of government procurement at *all* levels of government are encompassed within the exception.

Here, the specification that U.S. steel be used in the Project —whether viewed as a specification of the Commonwealth of Virginia, the federal government or as a federal/state governmental collaboration—clearly emanates from the United States of America. The United States is a Party to the NAFTA. Under the plain meaning of Article 1108, therefore, the procurement at issue here is that of a Party.[13]

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[11] *See* NAFTA art. 1108(1)(a)(i) (specifying that certain articles do not apply to "a Party at the federal level"); NAFTA art. 1108(1)(a)(ii) (specifying that certain articles do not apply to measures maintained by "a state or province"); NAFTA art. 1108(1)(a)(iii) (specifying that certain articles do not apply to measures maintained by a local government). *See also generally* NAFTA art. 105 ("The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.").

[12] Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation, in* Canada Gazette 68, 148 (Jan. 1, 1994) [hereinafter CSI] (emphasis added).

[13] *Cf.* Article 1128 Submission of the United Mexican States (Jan. 18, 2002) at 2 ("this Tribunal has no jurisdiction to consider what is in reality a complaint about U.S. government procurement practices.").

* * * *

ADF's argument rests on the false assumption that preserving and promoting states' and provincial rights is one of the NAFTA's objectives.[22] Nowhere, however, does the NAFTA suggest as an object and purpose a desire that the NAFTA Parties' federal governments refrain from encouraging sub-central governments to adopt policies deemed to be in the national interest. Contrary to ADF's contentions, the existence and extent of sub-central governments' policy-making independence from the NAFTA Parties' central governments is not a concern of the NAFTA. Indeed, it would be odd for the NAFTA Parties to enter into an international agreement for the purpose of effecting changes to the relationships between their own central and sub-central governments. And, most importantly, the langu-age of Article 1108 belies any such purported purpose—it does not differentiate between procurement by different levels of the government of the Party in its exclusion of all "procurement by a Party."

Nor, contrary to ADF's suggestion, is there any rule of treaty interpretation that authorizes a tribunal to broaden or expand a treaty's terms in order to advance goals that the Parties reserved for *future* decision. Yet, this is precisely what ADF advocates in relying on Article 1024 to justify an extension of national-treatment and performance-requirement obligations to federally-funded state procurement.[23] ADF is correct that the NAFTA Parties indicated in Article 1024 an intent to engage in future negotiations to attempt to reach agreement to extend these and other obligations

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[22] *See*, *e.g.*, Reply ¶ 38 ("Rather than permitting the state governments to make their own policy decisions respecting what is appropriate in their trading relations, the federal government seeks to impose a choice for them and a choice that runs directly contrary to the stated object and purpose of NAFTA."); *id.* at ¶ 64 ("the Parties did not want to bind states or provinces against their will.").

[23] *See* Reply ¶ 93 (stating that the United States' position "runs directly contrary to the object and purpose of NAFTA but also to the express obligation that the Parties have undertaken 'to commence negotiations . . . with a view to the further liberalization of their respective government procurement markets' and to seek 'to expand the coverage' of Chapter Ten.") (quoting NAFTA art. 1024).

to sub-central procurement. That statement of intent, however, does not mean that a tribunal may substitute its decision for the negotiated resolution the Parties agreed to attempt in Article 1024. The Parties have not yet agreed to expand their Agreement to reach sub-central procurement. It is the Agreement as written that this Tribunal must apply.[24]

* * * *

The United States' point . . . is a simple one: in order to make out an Article 1102 claim, ADF must prove the elements required by that Article. Article 1102 requires a showing of less favorable treatment "with respect to . . . *investments*," not with respect to trade in goods or services. NAFTA art. 1102(1) & (2) (emphasis added). Article 1102 does not prohibit discrimination against goods of different national origin: instead, the text of that Article only prohibits treating *investors* and *investments of investors* less favorably than U.S. investors and U.S. investments in like circumstances.

The Article's focus on investment rather than goods was no oversight. Article 1003(1), by contrast, expressly requires national treatment of "the *goods* of another Party, [of] the *suppliers* of such goods and [of] service suppliers of another Party." (Emphasis added.) The drafters of the NAFTA thus clearly understood how to craft a provision addressing national treatment of goods and suppliers. Their use of different language in Article 1102 confirms that that article addresses a different topic.

The text of the NAFTA thus provides no support for ADF's claim of an Article 1102 violation. ADF's assertion that the 1982 Act discriminates against Canadian steel in favor of U.S. steel, even if proven true, cannot establish a violation of Article 1102's national-treatment obligation—because that obligation addresses different treatment of *investments*, not

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[24] *See* NAFTA art. 1131(1) ("A Tribunal established under this Section shall decide the issues in dispute in accordance with *this* Agreement. . . .") (emphasis added); *see also* Article 1128 Submission of the United Mexican States, *supra* n. 13, at 2 ("the Tribunal has no jurisdiction to supplement or otherwise expand upon the rights and obligations contained in the NAFTA.").

goods.[42] Nor can ADF establish a violation of Article 1102 by suggesting, as it does repeatedly, that the measure treats *suppliers* of Canadian-fabricated steel or their steel differently than suppliers of U.S.-fabricated steel.[43] ADF, rather, must demonstrate that it has received less favorable treatment than U.S. *investors* or U.S.-owned *investments*. This it has failed to do.[44]

ADF further errs in characterizing as an "artificial distinction" that between "the services provided by the investor, which are, necessarily, outside of the territory in which the investment is located, and those provided by its investments. . . ." Reply ¶ 204. This distinction between services provided by an investor and those provided by an investment is not, as ADF suggests, "artificial," but is, rather, one drawn by the express terms of Chapter Eleven. The scope of application of Chapter Eleven is limited, in pertinent part, to "measures . . . relating to . . . *investments* of investors of another Party *in the territory of the Party*." NAFTA art. 1101(1) (emphasis added). Article 1102(1) requires a comparison between the treatment accorded domestic and foreign *investors* with respect to investments. Article 1102(2) requires one between the treatment accorded domestically-owned and foreign-owned *investments* with respect to investments. *No* provision in Chapter Eleven authorizes

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[42] *See also* Article 1128 Submission of the United Mexican States, *supra* n. 13, at 2 ("Mexico agrees with the United States that the measures complained of by the Claimant relate to the treatment of goods in a government procurement context, not investments, and therefore are not within the scope of Chapter Eleven.").

[43] *See*, *e.g.*, Reply ¶ 184 (asserting that the measure "modif[ied] the condition of competition in favour of domestic suppliers compared to non-national suppliers"); *id.* ¶ 211 ("The Buy America provision in question is effectively a bar to the importation of fabricated steel for certain markets.").

[44] Thus, ADF cannot demonstrate an Article 1102 violation even if it could prove that ADF Group was unable to supply steel from its Canadian plant to the Project. In this respect, ADF Group is no different from any other Canadian or Mexican supplier of steel that is not an investor and does not have an investment in the United States. No one would argue that those suppliers could challenge under NAFTA Article 1102 their inability to supply steel to a project due to the application of the 1982 Act. ADF lacks standing to submit a claim for effects that the 1982 Act may have on it that are in no way based on the United States' treatment of it as an investor in the United States.

a national treatment comparison between investors and investments. The express terms of the NAFTA thus provide no support for ADF's claim of a national-treatment violation.

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Furthermore, ADF's speculative claim for "damages in respect of all *future* contracts" is precluded by the NAFTA in any event. Reply ¶ 267 (emphasis added). NAFTA investor-State arbitration is inherently retrospective in application. Articles 1116 and 1117, which allow for the submission of claims only "that another Party has *breached* an obligation . . . and that the [investor/enterprise] has *incurred* loss or damage by reason of, or arising out of, that breach," are drafted in the past tense. NAFTA arts. 1116(1), 1117(1) (emphasis added). Similarly, under Article 1120, six months must elapse from the events giving rise to the claim before a claim may be submitted to arbitration. NAFTA art. 1120(1). No claim based on speculation as to future breaches may be submitted consistent with these provisions. Thus, as Chapter Eleven allows a disputing investor to submit claims only for breaches that have actually occurred, ADF may not submit a claim for possible future breaches.

(2) Post-Hearing Submission of June 27, 2002

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The "international minimum standard" embraced by Article 1105(1) is an umbrella concept incorporating a set of rules that over the centuries have crystallized into customary international law in specific contexts.[3] The treaty term "fair and equitable

[3] *See* Transcript of Hearing, Apr. 17, 2002, at 758–60 (statement by Mr. Legum); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 531 (5th ed. 1998) ("there is no single standard but different standards relating to different situations."); *see also id.* at 529 ("The basic point would seem to be that there is no single standard."); 5 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 46 (1970) ("The great majority of commentators hold that there exists in this respect an international minimum standard according to which States must accord to foreigners *certain rights* . . . , even where they refuse such treatment to their own nationals.") . . . (emphasis supplied; translation by counsel).

treatment" refers to the customary international law minimum standard of treatment.[4] The rules grouped under the heading of the international minimum standard include those for denial of justice, expropriation and other acts subject to an absolute, minimum standard of treatment under customary international law.[5] The treaty term "full protection and security" refers to the minimum level of police protection against criminal conduct that is required as a matter of customary international law.[6]

The rules encompassed within the customary international law minimum standard of treatment are specific ones that address

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[4] *See* U.S. Rejoinder at 42 n. 62 & accompanying text; *accord* Transcript, Apr. 17, 2002, at 761 (statement by Mr. Legum).

[5] *See*, *e.g.*, Swiss Dep't of External Affairs, *Mémoire*, 36 Ann. Suisse de Droit Int'l 174, 179 (1980) ("So far as the content of this standard is concerned, we can limit ourselves to describing it as it relates to the property rights of foreigners since article 2 of the BIT addresses 'fair and equitable treatment' of only 'investments.' On this point, it is appropriate to note the following: foreign property can be nationalized or expropriated only upon prompt payment of an effective and adequate indemnity. The foreigner must also have access to the judiciary to defend himself against wrongful acts against his property by individuals. Moreover, the alien may require that his person and his goods be protected by the authorities in the event of riots, in a state of emergency, etc. . . . The expression 'fair and equitable treatment' encompasses the ensemble of these elements.") . . .

[6] Tribunals have found the obligation of full protection and security to have been breached only in cases where the criminal conduct involved a physical invasion of the person or property of an alien. *See*, *e.g.*, *American Manufacturing & Trading, Inc. (U.S.) v. Zaire*, 36 I.L.M. 1531 (1997) (finding violation of protection and security obligation in case involving destruction and looting of property); *Asian Agricultural Products Ltd. (U.K.) v. Sri Lanka*, 30 I.L.M. 577 (1991) (similar finding in case involving destruction of claimant's property); *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24) (similar finding in case involving hostage-taking of foreign nationals); *Chapman v. United Mexican States (U.S. v. Mex.)*, 4 R.I.A.A. 632 (Mex.-U.S. Gen. Cl. Comm'n 1930) (similar finding in case where claimant was shot and seriously wounded); *H.G. Venable (U.S. v. Mex.)*, 4 R.I.A.A. 219 (Mex.-U.S. Gen. Cl. Comm'n 1927) (bankruptcy court indirectly responsible for physical damage to attached property); *Biens Britanniques au Maroc Espagnol (Réclamation 53 de Melilla—Ziat, Ben Kiran) (Spain v. Gr. Brit.)*, 2 R.I.A.A. 729 (1925) (no violation where police protection under the circumstances would not have prevented mob from destroying claimant's store).

particular contexts. There is no single standard applicable to all contexts. The customary international law minimum standard is in this sense analogous to the common-law approach of distinguishing among a number of distinct torts potentially applicable to particular conduct, as contrasted with the civil-law approach of prescribing a single delict applicable to all conduct. As with common-law torts, the burden under Article 1105(1) is on the claimant to identify the applicable rule and to articulate and prove that the respondent engaged in conduct that violated that rule.

Thus, for example, in a case in which a claimant asserts that it has suffered injury as a result of an allegedly unjust court judgment, the factors a tribunal applying Article 1105(1) must take into account are those for an alleged substantive denial of justice: whether the judgment in question effects a "manifest injustice" or "gross unfairness,"[7] "flagrant and inexcusable violation,"[8] or "palpable deviation" in which "[b]ad faith—not judicial error seems to be the heart of the matter."[9] Where a claimant asserts that it suffered injury as a result of the destruction of its property by private citizens, the factors a tribunal applying Article 1105(1) must take into account are those for an alleged denial of full protection and security: whether, under all the circumstances, the

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[7] J.W. Garner, *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice*, 1929 BRIT.Y.B. INT'L L. 181, 183; *see also id.* at 188 ("manifestly or notoriously unjust" decisions).

[8] Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 267, 281 (1978).

[9] 2 DANIEL P. O'CONNELL, INTERNATIONAL LAW 948 (2d ed. 1970); *see also*, *e.g.*, *Garrison's Case (U.S. v. Mex.)* (1871), 3 MOORE'S INT'L ARBITRATION 3129 (1868) (an "extreme" case where court "act[ing] with great irregularity" refused Garrison's appeal "by intrigues or unlawful transactions"); *Rihani*, Am.-Mex. Cl. Comm'n (1942), 1948 Am. Mex. Cl. Rep. 254, 257–58 (finding decision of the Supreme Court of Justice of Mexico "such a gross and wrongful error as to constitute a denial of justice"); *The Texas Company*, Am.-Mex. Cl. Comm'n (1942), 1948 Am. Mex. Cl. Rep. 142, 144 (rejecting claim for failure to show error by Supreme Court of Justice of Mexico "resulting in a manifest injustice"); *Chattin (U.S.) v. Mexico* (1927), 4 R.I.A.A. 282, 286–87 (requiring that injustice committed by judiciary rise to the level of "an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man").

police exerted the minimum level of protection against criminal conduct required as a matter of customary international law.[10]

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The *Pope* tribunal was wrong to suggest in *dicta* that the NAFTA grants it the authority to sit in judgment of the NAFTA Parties' acts undertaken pursuant to NAFTA Chapter Twenty.[20] Although the NAFTA contemplates that both the Free Trade Commission and Chapter Eleven tribunals may have reason to interpret the meaning of a provision of the Agreement, the text of the NAFTA confirms the subsidiary role of Chapter Eleven tribunals *vis-à-vis* the FTC in that regard.

In Chapter Twenty, the three NAFTA Parties gave the FTC plenary authority over the implementation and interpretation of the NAFTA generally. Among other things, Chapter Twenty provides that "[t]he Commission *shall* . . . supervise the implementation of this Agreement," and it *shall* resolve, without qualification, "disputes that may arise regarding its interpretation or application[.]" NAFTA art. 2001(2)(a), (c) (emphasis added). The three Parties thus manifested their shared intent "to arrive at a mutually satisfactory resolution"—through the Free Trade Commission—"of *any matter* that might affect [the NAFTA's] operation." *Id.* art. 2003 (emphasis added).

Chapter Eleven, in contrast, authorizes *ad hoc* Chapter Eleven tribunals to settle only a limited range of investment disputes and, likewise, grants each tribunal limited authority over a particular investment dispute and the individual claimant and NAFTA Party involved. *See* NAFTA arts. 1116–1117; art. 1136(1) ("An award made by a Tribunal shall have no binding force except between disputing parties and in respect of the particular case.").[21] Thus,

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[10] *See* authorities cited *supra* n. 6.

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[20] *See Pope* Damages Award ¶¶ 23–24.

[21] *See also* NAFTA art. 1134 (Chapter Eleven tribunals may not even issue recommendations with respect to the measure alleged to constitute a breach).

although a tribunal may be called upon to apply a provision of the NAFTA in settling an investment dispute (*see id.* art. 1131(1)), its own interpretation of such a provision does not bind other Chapter Eleven tribunals.

The same is not true, however, of an interpretation by the FTC, which binds all Chapter Eleven tribunals. Indeed, the NAFTA directly addresses the possibility that a Chapter Eleven tribunal may have to apply a provision of the NAFTA as to which the FTC has issued an interpretation. In such a case, the FTC's plenary power overrules a tribunal's authority to interpret particular NAFTA provisions in deciding issues in investment disputes: "An interpretation by the Commission of a provision of this Agreement *shall be binding* on a Tribunal established under [Section B of Chapter Eleven]."[22] It follows that a Chapter Eleven tribunal may not disregard an interpretation of a provision of the NAFTA by the NAFTA Parties, acting through the FTC pursuant to Chapter Twenty, or interpret that provision in a manner inconsistent with an FTC interpretation.[23] The NAFTA Parties thus expressly limited the powers of Chapter Eleven tribunals with respect to the interpretation of the NAFTA, and made those powers subject to decisions taken by the Free Trade Commission.

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As the United States previously demonstrated and the FTC confirmed, the *Pope* tribunal erred in its interpretation of Article

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[22] NAFTA art. 1131(2) (emphasis added). Even the *Pope* tribunal recognized that such an interpretation binds all constituted tribunals, regardless of the phase of the pending arbitration. *See Pope* Damages Award ¶ 51.

[23] Indeed, the NAFTA considers the views of the Parties regarding questions of interpretation to be of significant importance even when not expressed in the form of a binding interpretation under Article 1131(2). *See, e.g.*, NAFTA art. 1128 (allowing non-disputing Parties to make submissions to a tribunal regarding questions of interpretation); *id.* art. 2020 (calling on the NAFTA Parties to seek agreement on an interpretation of the NAFTA when the issue of interpretation arises in a domestic proceeding); *see also id.* art. 1132 (providing that, where a defense is asserted based on a reservation or exception set out in an Annex, an interpretation by the Commission "shall be binding" on a tribunal, and only if no interpretation is submitted shall the tribunal decide the issue).

1105(1) in its April 10, 2001 Award on the Merits ("*Pope* Merits Award").[27] This incorrect interpretation, which the *Pope* tribunal reiterated in its May 31, 2002 Damages Award (but ultimately did not apply), defies established principles of treaty interpretation in several respects.[28]

First, the *Pope* tribunal admitted that its interpretation of Article 1105(1) is inconsistent with the plain meaning of that Article's text.[29] Such an approach flatly disregards the cardinal rule, set forth in the Vienna Convention on the Law of Treaties ("Vienna Convention"), that "[a] treaty shall be interpreted . . . in accordance with the ordinary meaning to be given to the terms of the treaty[.]"[30]

Second, there is no basis in international law for the *Pope* tribunal's analysis of the phrase "international law" in Article 1105(1) based solely on the reference to that term in the Statute of the International Court of Justice, a treaty not related to the NAFTA.[31] To the contrary, customary international law requires that treaty terms be construed "*in their context* and in the light of [the treaty's] object and purpose."[32] That context includes the text of the treaty and certain related instruments, but does not include unrelated treaties.[33]

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[27] *See* Counter-Mem. at 49–50; Rejoinder at 33.

[28] *See Pope* Damages Award ¶¶ 9, 44.

[29] *See id.* ¶ 9 ("[T]he Tribunal determined that, notwithstanding the language of Article 1105, *which admittedly suggests otherwise*, the requirement to accord NAFTA investors fair and equitable treatment was independent of, not subsumed by the requirement to accord them treatment required by international law.") (emphasis added).

[30] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention"), art. 31(1).

[31] *See Pope* Damages Award ¶ 46 & n. 35 (relying exclusively on Article 38 of the Statute of the International Court of Justice). Contrary to the *Pope* tribunal's approach, Article 38 does not purport to define the term "international law" in any event.

[32] Vienna Convention art. 31(1) (emphasis added).

[33] *See id.* art. 31(2) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text . . . : (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.").

The context of Article 1105(1), which the *Pope* Damages Award does not consider, unequivocally demonstrates that the NAFTA Parties did *not* intend to incorporate the entirety of international law in that provision. Notably, the NAFTA's provisions show that, although the Parties were well aware of the international legal obligations contained in the NAFTA and in other agreements in force between them,[34] they intended to subject to investor-State arbitration only a narrow range of obligations: Articles 1116(1) and 1117(1) provide for investor-State arbitration only of "a claim that another Party has breached an *obligation under . . . Section A or Article 1503(2) . . .* or *. . . Article 1502(3)(a)*[.]" (Emphasis added). Reading Article 1105(1) to encompass *all* international legal obligations would render meaningless the clearly stated limitation in Articles 1116 and 1117. If the NAFTA Parties intended to offer Chapter Eleven arbitration for breaches of any international legal obligation, including those contained in the NAFTA, they would not have drafted Articles 1116 and 1117 as they did.

For example, the NAFTA states various obligations of the NAFTA Parties with respect to sanitary and phytosanitary measures. *See*, *e.g.*, NAFTA Chapter Seven, Section B, arts. 709–723. The NAFTA, of course, is an international convention within the meaning of Article 38(1)(a) of the Statute of the International Court of Justice, and the obligations with respect to sanitary and phytosanitary measures are obligations in international law as among the NAFTA Parties. Articles 1116(1) and 1117(1) make perfectly clear, however, that the NAFTA Parties did not intend to subject claims of violations of those international law obligations to investor-State arbitration under Chapter Eleven of the NAFTA. Reading Article 1105(1) to encompass all international legal obligations, including these, cannot be reconciled with the context of the provision.

Similarly, under the *Pope* tribunal's interpretation of Article 1105(1), it would be unnecessary for a claimant under Chapter Eleven to specify that it was bringing a claim under any article of Section A of Chapter Eleven other than Article 1105(1). Rather,

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[34] *See* NAFTA art. 103 ("In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency. . . .").

under the *Pope* tribunal's reading, a claim of a violation of, for example, Chapter Eleven's national treatment provision would be subsumed in an Article 1105(1) claim. Those incongruous results are not what the NAFTA Parties intended. Indeed, the binding FTC Interpretation has made it clear that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)." FTC Interpretation (July 31, 2001) ¶ B(3).

The context of Article 1105(1) further shows that the international legal obligations the NAFTA Parties had in mind in Article 1105(1) were those setting forth minimum standards of treatment of foreign persons and their property in the territory of the host State. NAFTA Article 1105(1) itself reflects the NAFTA Parties' commitment to provide "investments of investors of *another Party*" with the international minimum standard of treatment. The title of the article is "Minimum Standard of Treatment."[35] There is a body of international law that sets forth minimum standards of treatment for property of nationals of a State in the territory of another State. As the FTC observed in its clarification, that body of law is one established under customary international law, and it is known as the customary international law minimum standard of treatment of aliens.[36] Thus, the context of Article

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[35] *See also* NAFTA art. 1101(1)(a)–(b) (limiting the scope of application of Chapter Eleven, in pertinent part, to "measures maintained or adopted by a Party relating to . . . investments of investors of another Party in the territory of the Party").

[36] *See* FTC Interpretation ¶ B(1)–(2). Contrary to the *Pope* tribunal's erroneous suggestion, the NAFTA Parties did not seek, by issuing the interpretation of Article 1105(1), to modify the phrase "international law." *See Pope* Damages Award at n. 9 ("the clarification consisted of adding the word 'customary' as a modifier."); *id.* at n. 37 (characterizing the United States' position as arguing "that the term 'international law' in Article 1105 means customary international law"). Rather, in paragraph B(1) of the July 31, 2001 Interpretation, the three NAFTA Parties interpreted the meaning of the obligation agreed to in Article 1105(1): "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."

1105(1) conclusively confirms the correctness of the FTC interpretation and rejects the ill-considered views of the *Pope* tribunal.

Third, the *Pope* tribunal similarly erred in its reliance on provisions of bilateral investment treaties ("BITs") to interpret NAFTA Article 1105(1).[37] Those treaties are not part of the context for interpreting Article 1105(1) as defined by Article 31(2) of the Vienna Convention. The Vienna Convention clearly defines the "context" of a treaty to include only those "agreement[s] . . . which [were] *made between all the parties*" of the treaty and "instrument[s] . . . made by one or more parties . . . and *accepted by the other parties* as an instrument related to the treaty."[38] Neither Mexico nor Canada has entered into a BIT with the United States. Nor has any NAFTA Party accepted, as contemplated by Article 31(2) of the Vienna Convention, the BITs as instruments related to the NAFTA. Therefore, the *Pope* tribunal erred in relying on the BITs as "context" to interpret the NAFTA.

Moreover, there is no foundation in any event for the *Pope* Award's suggestion of "stark inconsistencies" between the BITs' provisions on "fair and equitable treatment" and the text of Article 1105(1).[39] The *Pope* tribunal's reading of those BIT provisions, based in particular on the views of academics regarding United States BITs, is flatly inconsistent with what the United States Department of State repeatedly has advised the United States Senate that provision means in submitting the treaties for constitutionally-required advice and consent: that the provision was intended to require a minimum standard of treatment based on *customary international law*.[40] The United States' understanding of the BITs it negotiated is the same as the understanding of NAFTA Article

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[37] *See Pope* Merits Award ¶¶ 110–117; *Pope* Damages Award ¶¶ 9, 27, 44, 61–62.

[38] Vienna Convention art. 31(2) (emphasis added).

[39] *See Pope* Damages Award ¶ 25.

[40] *See* U.S. Rejoinder at nn. 59–61 & accompanying text (listing Department of State letters submitting U.S. BITs to Congress that clarify that " 'fair and equitable' treatment in accordance with international law . . . sets out a minimum standard of treatment based on customary international law").

1105(1) expressed in the Canadian Statement of Implementation, issued on January 1, 1994, the day the NAFTA entered into force: "Article 1105 . . . provides for a minimum absolute standard of treatment, *based on long-standing principles of customary international law*."[41] The *Pope* tribunal therefore erred in suggesting that there were inconsistencies between the "fair and equitable treatment" provisions of the BITs and Article 1105(1).[42]

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As the United States has previously advised this Tribunal, customary international law, including the minimum standard of treatment of aliens, may evolve over time. *Cf. Pope* Damages Award ¶ 58 (rejecting "static conception of customary international law"). In addition, treaties, including BITs, may constitute a form of State practice as between or among the parties to a given treaty. However, the United States disagrees with the *Pope* Damages Award in that it appears to ascribe legal significance to this form of State practice without further analysis.

It is elemental that a rule may be considered to form part of customary international law only where the rule is established by a general and consistent practice of States *followed by them*

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[41] Canadian Statement of Implementation at 149 (Jan. 1, 1994) (emphasis added).

[42] The *Pope* tribunal mischaracterized the United States as having "asserted that the difference [between the text of the BITs and Article 1105(1) of the NAFTA] was the product of a conscious decision by the NAFTA Parties to change the approach in the BITs." *Pope* Damages Award ¶ 27. Rather, the United States explained to the *Pope* tribunal that the NAFTA Parties, in Article 1105(1), merely "chose a formulation that expressly tied fair and equitable treatment to the customary international minimum standard" to exclude any other conclusion in light of the academic debate concerning the meaning of the phrase "fair and equitable treatment" as it appears in the BITs without express reference to customary international law. Fourth Submission of the United States in *Pope & Talbot, Inc. v. Canada* (Nov. 1, 2000) ¶¶ 7–8. Notwithstanding the academic debate, however, neither the U.S. BITs nor NAFTA Article 1105(1) requires treatment beyond the minimum standard of treatment based on customary international law.

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from a sense of legal obligation.[53] In other words, a customary international law rule is established by two elements: "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law (the *opinio juris*)."[54]

In addition, the International Court of Justice has observed that several factors must be considered in assessing whether a *treaty-based* rule reflects *opinio juris* supporting the existence of a customary, rather than simply a treaty-based, obligation. In *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, the Court held that, in order for a provision to become part of customary international law, among other things, it must be "a norm-creating provision," one which "is now accepted as [a norm of the general corpus of international law] by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention."[55]

While a bilateral investment treaty may reflect State practice between the two parties to that BIT, the *Pope* tribunal erred in its analysis of the BITs. It made no attempt to analyze either the consistency of State practice in investment treaties or whether any such State practice evidenced the *opinio juris* necessary to establish customary international law.[56] The tribunal does not even mention *opinio juris*, let alone cite any evidence of it. Indeed, as mentioned above, the *Pope* tribunal found "stark inconsistencies between the provisions of BITs and corresponding commitments of Article 1105."[57] Thus, because it failed even to attempt the requisite analysis, the *Pope* tribunal's statement that BITs are State practice cannot support a view that any particular BIT obligation has crystallized into a rule of customary international law.

3. The *Pope* Tribunal Erred In Its Analysis Of Authority Purportedly Supporting Its Award.

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[53] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

[54] CLIVE PARRY, JOHN P. GRANT, ANTHONY PARRY & ARTHUR D. WATTS, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 82 (1986).

[55] 1969 I.C.J. 3, 41 ¶ 71 (Feb. 20).

[56] *See Pope* Damages Award ¶¶ 59–62.

[57] *Id.* ¶ 25.

Finally, the United States notes that the decision of the Chamber of the International Court of Justice in *Elettronica Sicula S.P.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20), does not support the *Pope* tribunal's conclusions with respect to the evolution and content of customary international law.[58]

In *ELSI*, the ICJ interpreted a treaty provision, not replicated in the text of the NAFTA, which prohibited certain "arbitrary" measures.[59] The ICJ was not applying customary international law to the claims of arbitrariness presented in *ELSI*. Thus, contrary to the *Pope* tribunal's suggestion, the decision in *ELSI* cannot reflect an evolution in customary international law. Of course, citation to a single authority applying a conventional standard does not demonstrate the requisite State practice or *opinio juris* necessary to establish the existence of a principle of customary international law.[60] In fact, *ELSI* did not even purport to address customary international law standards requiring treatment of an alien amounting to an "outrage" for a finding of a violation. In any event, ELSI clearly does not establish that any relevant standard under customary international requires mere "surprise."[61]

(3) Post-Hearing Submission of August 1, 2002

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[58] *See Pope* Damages Award ¶¶ 63–64.

[59] *See ELSI*, 1989 I.C.J. at 72 (quoting Article I of the Supplementary Agreement to the 1948 FCN Treaty between Italy and the United States as follows: "The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures. . . ."). Even assuming the *Pope* tribunal's broad view of the meaning of Article 1105(1) is correct (and it is not), because the FCN Treaty in *ELSI* is not in force as between Canada, Mexico and the United States, the *ELSI* cannot provide any rule of decision applicable here. *See* Statute of the International Court of Justice art. 38(1)(a) (stating that the ICJ shall apply "international conventions . . . establishing rules expressly recognized by the contesting states").

[60] *See supra* nn. 53–54 and accompanying text.

[61] *See Pope* Damages Award ¶ 64.

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As a preliminary matter, all three NAFTA Parties confirm in their submissions that, contrary to the views expressed by the *Pope* tribunal, the NAFTA does not permit a Chapter Eleven tribunal to review an interpretation of the NAFTA Parties, sitting as members of the FTC, and disregard it on the ground that the tribunal considers it to be an "amendment."[5] Thus, there is agreement among the Parties that the *Pope* tribunal erred when it determined that it should question whether the FTC interpretation was binding on it.[6]

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Furthermore, all three NAFTA Parties agree that the *Pope* tribunal was wrong in suggesting *in dicta* that the FTC Interpretation was an amendment.[7] As the FTC Interpretation makes clear, the interpretation does not change the meaning of Article 1105(1)—it merely clarifies the meaning that the Article has always had.[8] As all three NAFTA Parties have noted, interpreting the words "international law" in Article 1105(1) to refer to all international law, as the *Pope* tribunal suggested, runs afoul of well-established principles of treaty interpretation—notably, by depriving Articles 1116 and 1117 of their effectiveness and by disregarding statements made by Canada contemporaneously with the NAFTA's entry into force.[9]

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[5] *See* Can. Submission ¶¶ 7–17; Mex. Submission at 18–19; U.S. Submission at 8–12.

[6] *See generally id.*

[7] *See* Can. Submission ¶¶ 7, 18–29. *See generally* Mex. Submission at 3–10, 18–19; U.S. Submission at 12–19.

[8] *See* FTC Interpretation of July 31, 2001 chapeau ("[T]he Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to *clarify and reaffirm the meaning* of certain of its provisions[.]") (emphasis added).

[9] *See* Can. Submission ¶¶ 23, 25, 29; Mex. Submission at 4–6; U.S. Submission at 13–15, 17–18. The United States notes that even ADF can explain the *Pope* tribunal's analysis of the meaning of Article 1105(1) only by assuming that the tribunal, without so stating, drew an adverse inference against Canada for Canada's purported failure to produce all of the negotiating history pertaining to Article 1105(1). *See* ADF Submission ¶ 20.

The International Court of Justice has squarely rejected the contention that a general obligation of "good faith" exists, holding that:

> The principle of good faith is, as the Court has observed, "one of the basic principles governing the creation and performance of legal obligations" (*Nuclear Tests*, I.C.J. Reports 1974, p. 268, para. 46; p. 473, para. 49); *it is not in itself a source of obligation where none would otherwise exist.*[49]

In *Land and Maritime Boundary (Cameroon v. Nig.)*, 1998 I.C.J. 275 (June 11), the I.C.J. reaffirmed the proper role of good faith articulated above. The Court further noted that there was "no specific obligation in international law" applicable to the conduct at issue in that case, and concluded: "In the absence of any such obligations and of any infringement of Nigeria's corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submissions."[50]

While it is clear that there is no general obligation of good faith, the United States recognizes that international law does impose obligations of good faith in certain specific circumstances. For example, the United States agrees with ADF that the customary international law rule of *pacta sunt servanda* holds that "[e]very treaty in force is binding on the parties to it and must be performed by them in good faith."[51] Here, of course, the Buy America provisions were not issued to implement treaty obligations. ADF therefore has no basis to contend that the United States performed any treaty obligations in bad faith.

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2. Claim under Chapter 11 against Canada

United Parcel Service of America, Inc., a U.S. parcel delivery service provider, submitted claims against Canada under

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[49] *Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 I.C.J. 69, 105 ¶ 94 (Dec. 20) (emphasis added).

[50] *Land and Maritime Boundary*, 1998 I.C.J. at 297 ¶ 39.

[51] Vienna Convention art. 26; *see* ADF Submission ¶ 88.

the UNCITRAL rules, alleging that Canada Post engaged in anti-competitive practices. Specifically, UPS alleged that, in providing its non-monopoly courier and parcel services (Xpresspost and Priority Courier), Canada Post unfairly used its postal monopoly infrastructure to reduce the costs of delivering its non-monopoly services. UPS claimed that Canada had breached its obligations under the NAFTA (1) to supervise a "government monopoly" and "state entity" (Arts. 1502(3)(a) and 1503(2)); (2) to accord treatment no less favorable than it accords, in like circumstances, to its own investors (Article 1102); and (3) to accord treatment in accordance with international law (Article 1105). UPS sought US$160 million in damages.

On November 22, 2002, the tribunal issued an Award on Jurisdiction. The Award is available at *www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdflt.* The award dismissed a number of UPS's claims, including its claims under NAFTA chapter fifteen, to the extent those claims were not limited to alleged violations of obligations in section A of NAFTA chapter eleven, and UPS's article 1105 claim. The tribunal found no customary international law prohibiting or regulating anticompetitive behavior. Also, the tribunal rejected Canada's jurisdictional challenge to UPS's article 1102 claim, and joined two other jurisdictional challenges to the merits.

The United States had filed submissions pursuant to NAFTA Article 1128 on May 13, 2002 (second submission) and August 23, 2002 (third submission). Excerpts from the third submission are set forth below. The third submission also referred the tribunal to the U.S. position on the May 31 *Pope & Talbot* award concerning article 1105(1) as set forth in U.S. submissions in *ADF Group*, discussed *supra*.

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Relationship Between Chapters Fifteen and Eleven

2. The three NAFTA Parties agree that Article 1116(1)(b) allows an investor to submit a claim to arbitration for an alleged

breach of Article 1502(3)(a) only where the claim is that the respondent NAFTA Party failed to ensure that the subject monopoly acts in a manner that is not inconsistent *with an obligation embodied in a provision of Section A of Chapter Eleven.*[1]

3. Contrary to certain arguments advanced at the hearing, the three NAFTA Parties' common interpretation of Article 1116(1)(b) is in no way inconsistent with the plain language of Article 1502(3)(a).[2] Article 1502(3)(a) makes clear that a NAFTA Party cannot circumvent any of its obligations under the NAFTA simply by delegating governmental authority to a privately-owned or government monopoly.[3] A violation of Article 1502(3)(a) with respect to any provision in the NAFTA could be subject to State-to-State dispute resolution under Chapter Twenty.[4] By contrast, and as Article 1116(1)(b) explicitly states, a violation of Article 1502(3)(a) is also subject to investor-State dispute resolution under Chapter Eleven, but only with respect to "obligations under Section A" of Chapter Eleven.

4. The contrary interpretation advanced at the hearing would lead to absurd results. Under that interpretation, an investor could submit a claim to investor-State arbitration for acts of a privately-owned or government monopoly alleged to be inconsistent with *any* provision of the NAFTA. By contrast, an investor could submit a claim to investor-State arbitration based on an act by a NAFTA Party or state enterprise only when the NAFTA Party itself or the state enterprise acted inconsistently with an obligation embodied in Section A of Chapter Eleven. There simply is no rational basis

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[1] *See*, *e.g.*, July 29, 2002 Hearing Transcript ("7/29/02 Tr.") at 25, 28–29; Mexico's Submission Under NAFTA Article 1128 ("Mexico Sub."), dated May 14, 2002, ¶ 15(8) at 6; Second Submission of the United States of America ("U.S. Second Sub."), dated May 13, 2002, ¶ 6 at 3.

[2] *See* July 30, 2002 Hearing Transcript ("7/30/02 Tr.") at 287–89.

[3] *See* Mexico Sub. ¶ 15(1) at 5 (Article 1502(3)(a) "is designed to ensure that a State does not use a monopoly that exercises delegated powers to take action that would be inconsistent with the Agreement if such action were taken directly by the State itself.").

[4] Certain provisions of the NAFTA, however, are excepted even from the State-to-State dispute resolution mechanism in Chapter Twenty. *See*, *e.g.*, NAFTA art. 1501(3).

for deciding the applicability of Chapter Eleven's dispute resolution mechanism on the basis of whether the subject actor is a monopoly (referenced in Article 1502(3)(a)), rather than the respondent NAFTA Party itself or a state enterprise.[5] The NAFTA Parties did not intend such a distinction. And, indeed, they agree that the text of the NAFTA imposes a uniform and consistent requirement: whether the alleged breach is by a NAFTA Party itself, a referenced monopoly or a state enterprise, acts that are inconsistent with an obligation of the respondent NAFTA Party under Section A must be shown.

Delegated "Governmental Authority"[6]

5. The United States agrees with Canada's position at the hearing, with which Mexico also agrees, that a breach of Article 1502(3)(a) may only occur wherever a referenced monopoly "exercises" delegated "governmental authority."[7]

6. Moreover, contrary to certain arguments at the hearing, jurisdiction does not attach over a claim where the averred inconsistency with an obligation embodied in Section A of Chapter Eleven is alleged to result solely from the fact that a monopoly referenced in Article 1502(3)(a) is a monopoly—that is, that the monopoly functions as, possesses the status of, or is authorized to be a sole provider of a good or service.[8] Indeed, otherwise,

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[5] Also, the United States notes that, contrary to Claimant's assertion at the hearing, Article 1503(2) does not provide a basis for a claim under Section B of Chapter 11 for alleged violations of Sections B and C of Chapter 11. *See* 7/30/02 Tr. at 277. The Article 1503(2) reference to Chapter Eleven is to Section A only: as Sir Kenneth noted, *id.* at 280, a state enterprise cannot act in a manner inconsistent with a provision of Section B, which established the process by which NAFTA Parties—not state enterprises—engage in investor-State arbitration under the NAFTA; Section C, which merely includes definitions, prescribes no obligations of any kind.

[6] The concept of delegated "government authority" is the same in Articles 1502(3)(a) and 1503(2). Therefore, although the discussion that follows refers only to Article 1502(3)(a), the points made apply equally with respect to Article 1503(2).

[7] *See* 7/29/02 Tr. at 42; Mexico Sub. ¶ 15(6) at 5; U.S. Second Sub. ¶ 8 at 3–4.

[8] *See*, *e.g.*, 7/29/02 Tr. at 49, 53, 91, 92, 96–97.

the requirement that a referenced monopoly exercise delegated "governmental authority" would be entirely superfluous. As noted above (*see* ¶ 2), for a claim to be submitted under Chapter Eleven, the monopoly, in exercising its delegated "governmental authority," must allegedly have acted in a manner that is inconsistent with the respondent NAFTA Party's obligations under Section A of Chapter Eleven.[9] Relationship Between "Anticompetitive Practices" and NAFTA Articles 1102 and 1105.

7. The United States notes that the NAFTA does not define the term "anticompetitive practices," which is a complex term based on concepts of competition and regulation.[10] Accordingly, contrary to a suggestion at the hearing, a showing of "anticompetitive practices" does not, in and of itself, establish that a NAFTA Party has not accorded "treatment no less favorable" in the sense of Article 1102; nor does it establish a violation of the Article 1105 requirement to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment."[11]

* * * *

[9] At the hearing, questions regarding delegated "governmental authority" were asked based on the example of an operator of a prison. An example of the exercise of "governmental authority" delegated by a NAFTA Party (within the meaning of Article 1502(3)(a)) that also involves procurement by a government agency of a service for governmental purposes could be the contract operation of prisons for law enforcement authorities. Such procurement would be exempted from the application of Article 1502(3) by reason of Article 1502(4).

[10] *See*, *e.g.*, WTO Working Group on the Interaction Between Trade and Competition Policy, "Overview of Members' National Competition Legislation," Note by the Secretariat (Revisions, July 4, 2001), WT/WGTCP/W/128/Rev.2 (available at www.wto.org/english/tratop_e/comp_e/comp_e.htm).

[11] *See* 7/30/02 Tr. at 261–63.

3. State-to-State Arbitration under Chapter 20: Operation in the United States of Motor Carriers Owned or Controlled by Persons of Mexico

a. Presidential determination modifying moratorium

On November 27, 2002, President George W. Bush issued a determination under the Interstate Commerce Commission Termination Act of 1995, modifying a previously imposed moratorium on the issuance of certificates or permits to motor carriers domiciled in, or owned or controlled by persons of, a contiguous foreign country. 67 Fed. Reg. 71,795 (Dec. 2, 2002). Under U.S. law, foreign motor carriers are permitted to enter the United States only if authorized to do so. *See* 49 U.S.C. §§ 13501–13541, 13901–13908; 49 C.F.R. § 365.101–.511(2002). The President's November 27, 2002, determination explained the U.S. regulation of such cross-border transportation as follows:

> Section 6 of the Bus Regulatory Reform Act of 1982, Public Law 97–261, 96 Stat. 1103, imposed a moratorium on the issuance of certificates or permits to motor carriers domiciled in, or owned or controlled by persons of, a contiguous foreign country and authorized the President to modify the moratorium. The Interstate Commerce Commission Termination Act of 1995 (ICCTA), Public Law 104–88, 109 Stat. 803, maintained these restrictions, subject to modifications made prior to the enactment of the ICCTA, and empowered the President to make further modifications to the moratorium.

President Ronald Reagan had lifted a moratorium originally imposed regarding such motor carriers associated with Canada in 1982, following conclusion of "an understanding between the United States and Canada . . . to ensure fair and equitable treatment for both Canadian and United States trucking interests on both sides of the border." 47 Fed. Reg. 54,053 (Dec. 1, 1982).

As to Mexico, however, the moratorium had been continued, with certain exceptions. On February 6, 2001, a NAFTA arbitral tribunal established at the request of Mexico under chapter 20 of NAFTA determined that the continued moratorium violated NAFTA. In the Matter of Cross-Border Trucking Services (Secretariat File No. USA-MEX-98-2008-01), February 6, 2001, available at *www.nafta-sec-alena.org/images/pdf/ub98010e.pdf*.

As explained in the arbitral decision, annex I of NAFTA required that "a Mexican national will be permitted to obtain operating authority to provide cross-boundary trucking services in border states three years after the signing of NAFTA, i.e., December 18, 1995, and cross-border trucking services throughout the United States six years after the date of entry into force of NAFTA, i.e., January 1, 2000." *Id.* ¶ 67. Similar requirements required phase out in 1995 of restrictions with respect to investments for the establishment of enterprises providing international trucking services. *Id.* ¶ 68. Despite coordinated efforts to reach agreement to meet those deadlines, the two governments failed to do so. *Id.* ¶¶ 69–86. The United States explained that its actions were based on concerns relating to the safety of Mexican trucks, citing significant differences between U.S. and Mexican truck-safety regulations. *Id.* ¶¶ 78–79.

In its decision, the panel determined that the "U.S. blanket refusal to review and consider for approval any Mexican-owned carrier applications for authority to provide cross-border trucking services" breached U.S. NAFTA obligations; that the "inadequacies of the Mexican regulatory system provide an insufficient legal basis" for the continued U.S. moratorium, and that the United States remained in breach of its NAFTA obligations "to permit Mexican nationals to invest in enterprises in the United States that provide transportation of international cargo within the United States." *Id.* ¶¶ 295–297. The panel also noted, however, that it was not "determining that the Parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives . . . disagreeing that the

safety of trucking services is a legitimate regulatory objective . . .[or] imposing a limitation on the application of safety standards properly established and applied." Id. ¶ 298. As a result, the panel also noted in its recommendations that U.S. compliance with its NAFTA obligations would not require favorable consideration of all Mexican applications without regard to compliance with safety regulations, nor that Mexican applications be treated in the same manner as applications from U.S. or Canadian firms, as long as they are reviewed on a case-by-case basis. Id. ¶¶ 300–301.

Following the NAFTA decision, on June 5, 2001, President George W. Bush modified the existing moratorium to allow Mexican owned or controlled motor carriers domiciled in the United States to obtain operating authority between points in the United States. 66 Fed. Reg. 30,799 (June 7, 2001). President Bush also announced his intent to comply with the panel's ruling by further modifying the moratorium as it applied to Mexican-domiciled trucks once the Federal Motor Carrier Safety Administration, U.S. Department of Transportation ("FMCSA"), issued necessary regulations governing trucks domiciled in Mexico seeking United States operating authority.

Three regulations were issued by FMSCA for this purpose as Interim Final Rules on March 19, 2002: (1) Application by Certain Mexico-Domiciled Motor Carriers to Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border, 67 Fed. Reg. 12, 702 (Mar. 19, 2002); (2) Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States, 67 Fed. Reg. 12, 758 (Mar. 19, 2002) and (3) Certification of Safety Auditors, Safety Investigators, and Safety Inspectors, 67 Fed. Reg. 12, 776 (Mar. 19, 2002).

Excerpts below from the President's November 27, 2002 determination explain the decision to modify the moratorium as to Mexico-domiciled motor carriers.

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* * * *

Pursuant to 49 U.S.C. 13902(c)(3), I modified the moratorium on June 5, 2001, to allow motor carriers domiciled in the United States that are owned or controlled by persons of Mexico to obtain operating authority to transport international cargo by truck between points in the United States and to provide bus services between points in the United States.

The North American Free Trade Agreement (NAFTA) established a schedule for liberalizing certain restrictions on the provision of bus and truck services by Mexican-domiciled motor carriers in the United States. Pursuant to 49 U.S.C. 13902(c)(3), I hereby determine that the following modifications to the moratorium are consistent with obligations of the United States under NAFTA and with our national transportation policy and that the moratorium shall be modified accordingly.

First, qualified motor carriers domiciled in Mexico will be allowed to obtain operating authority to transport passengers in cross-border scheduled bus services. Second, qualified motor carriers domiciled in Mexico will be allowed to obtain operating authority to provide cross-border truck services. The moratorium on the issuance of certificates or permits to Mexican-domiciled motor carriers for the provision of truck or bus services between points in the United States will remain in place. These modifications shall be effective on the date of this memorandum.

Furthermore, pursuant to 49 U.S.C. 13902(c)(5), I hereby determine that expeditious action is required to implement this modification to the moratorium. Effective on the date of this memorandum, the Department of Transportation is authorized to act on applications, submitted by motor carriers domiciled in Mexico, to obtain operating authority to provide cross-border scheduled bus services and cross-border truck services. In reviewing such applications, the Department shall continue to work closely with the Department of Justice, the Office of Homeland Security, and other relevant Federal departments, agencies, and offices in order to help ensure the security of the border and to prevent potential threats to national security.

Motor carriers domiciled in Mexico operating in the United States will be subject to the same Federal and State laws, regulations, and procedures that apply to carriers domiciled in the

United States. These include safety regulations, such as drug and alcohol testing requirements; insurance requirements; taxes and fees; and other applicable laws and regulations, including those administered by the United States Customs Service, the Immigration and Naturalization Service, the Department of Labor, and Federal and State environmental agencies.

b. Litigation in U.S. courts

On May 1, 2002, labor, environmental and consumer groups filed petitions challenging the validity of the new regulations promulgated by the Federal Motor Carrier Safety Administration on March 19, 2002, noted above. *Public Citizen v. Dep't of Transportation*, No. 02–70986 and *Int'l Brotherhood of Teamsters v. Dep't of Transportation*, No. 02–71249 (9th Cir. 2002). The actions alleged violations of the procedural requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f *et seq*. the Clean Air Act, 42 U.S.C. §§ 7401–7671q. The U.S. Court of Appeals for the Ninth Circuit, which had jurisdiction to review the petitions under 28 U.S.C. § 2342(3)(A) providing for direct review in the court of appeals of certain administrative actions, consolidated the petitions on May 22, 2002. The litigation was pending at the end of 2002.

D. WORLD TRADE ORGANIZATION

1. WTO Cases Involving the United States

a. U.S. anti-subsidy law involving steel

On November 28, 2002, the WTO Appellate Body upheld key provisions of a U.S. trade law that provided a remedy against unfairly subsidized imports. In a case brought by the European Union involving subsidized German steel, the Appellate Body found that the U.S. trade laws were consistent with U.S. WTO obligations. Excerpts below from a press

release issued by the U.S. Trade Representative described the case and its significance for the United States.

The full text of the press release is available at *www.ustr.gov/releases/2002/11/02-113.htm*. The decision by the Appellate Body is available at *http://docsonline.wto.org/gen_search.asp* (WT/DS213/AB/R). U.S. submissions in the case are available at *www.ustr.gov/enforcement/briefs.shtml*.

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. . . . This is a victory not only for the United States, but for the multilateral trading system. With today's report, the Appellate Body has done what it should—interpret the WTO agreements as written.

* * * *

Background:

The WTO Appellate Body report released today arose out of a sunset review conducted by the U.S. Department of Commerce (Commerce) of the 1993 countervailing duty order on corrosion-resistant carbon steel products from Germany. In August, 2000, Commerce issued a final sunset review determination to the effect that revocation of the order would likely lead to a continuation or recurrence of subsidization. In December, 2000, the U.S. International Trade Commission (ITC) determined that revocation of the order would likely lead to a continuation or recurrence of material injury to the U.S. industry concerned. In light of these two findings, Commerce determined to leave the order in place.

On November 10, 2000, the EU requested dispute settlement consultations, and on August 8, 2001, the EU requested the establishment of a WTO dispute settlement panel. The EU challenged the specific Commerce determination, as well as certain aspects of the sunset review provisions of the U.S. countervailing duty law. The WTO panel circulated its final report on July 3, 2002. Although the report largely favored the United States, the panel did find against the United States on a few issues. Accordingly, the United States appealed, and the EU subsequently filed a cross-appeal with respect to the issues on which it lost.

Taking the Appellate Body and panel reports together, the following findings were made:

The Appellate Body affirmed the panel's finding that the U.S. system of automatically self-initiating sunset reviews is WTO-consistent. The EU claim to the contrary, if accepted, would have imposed an additional burden on U.S. industries seeking relief from subsidized imports.

The Appellate Body reversed the panel and found that the standard used in sunset reviews by Commerce for purposes of determining when subsidies are de minimis—and, thus, non-actionable—was not WTO-inconsistent. Here, too, the EU claim, if accepted, would have weakened the remedy against subsidized imports.

The Appellate Body affirmed the panel's finding that the U.S. countervailing duty law is not inconsistent with an authority's obligation under the Subsidies Agreement to determine the likelihood of continuation or recurrence of subsidization in a sunset review.

The Appellate Body affirmed the panel's finding that certain EU claims were not properly before the panel. These claims involved the EU's allegations that with respect to the U.S. countervailing duty law in general, and the sunset review on German steel in particular, interested parties are not given ample opportunity to submit evidence, as required by the Subsidies Agreement.

The EU did not appeal the panel's finding that the EU claim concerning the U.S. expedited sunset review procedure was not properly before the panel.

The United States did not appeal the panel's finding that in the particular sunset review on corrosion-resistant carbon steel products from Germany, Commerce failed to properly determine whether a continuation or resumption of subsidization was likely.

b. Challenge to U.S. trademark provision

On January 2, 2002, the Appellate Body of the WTO issued a report (WT/DS176/AB/R) in a case in which the European Union challenged a U.S. law limiting the ability of Cuban entities or their successors to claim ownership of trademarks and trade names that were confiscated unless the original

owner has consented. The report is available at *http://docsonline.wto.org/gen_search.asp*. The EU had requested consultations on section 211 of the Omnibus Appropriations Act of 1998, Pub. L. No. 105–277, 112 Stat. 2681, in July 1999, claiming that the U.S. law violated the Agreement on Trade-Related Intellectual Property Rights (TRIPs). Section 211 provides:

> (a) (1) Notwithstanding any other provision of law, no transaction or payment shall be authorized or approved pursuant to section 515.527 of title 31, Code of Federal Regulations, as in effect on September 9, 1998, with respect to a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of the mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.
>
> (2) No U.S. court shall recognize, enforce or otherwise validate any assertion of rights by a designated national based on common law rights or registration obtained under such section 515.527 of such a confiscated mark, trade name, or commercial name.
>
> (b) No U.S. court shall recognize, enforce or otherwise validate any assertion of treaty rights by a designated national or its successor-in-interest under sections 44 (b) or (e) of the Trademark Act of 1946 (15 U.S.C. § 1126 (b) or (e)) for a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of such mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.

A WTO panel, composed in October 2000 to consider the EU's complaint, circulated its report on August 6, 2001. Both the United States and the EU appealed aspects of that report.

The Appellate Body report found that the law's treatment of U.S. and Cuban companies was contrary to the national treatment and most-favored-nation obligations under WTO rules. At the same time, it overturned the earlier panel report finding that section 211 denied parties fair and equitable judicial procedures to enforce trademark rights. Excerpts below from the Appellate Body decision describe the applicability of section 211 (footnotes omitted).

The full text of the Appellate Body report is available at *http://docsonline.wto.org*. Submissions by the United States in the case are available at *www.ustr.gov/enforcement/briefs.shtml*.

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4. Section 211 applies to a defined category of trademarks, trade names and commercial names, specifically to those trademarks, trade names and commercial names that are "the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated" by the Cuban Government on or after 1 January 1959. Section 211(d) states that the term "designated national" as used in Section 211 has the meaning given to that term in Section 515.305 of Title 31, Code of Federal Regulations ("CFR"), and that it includes "a national of any foreign country who is a successor-in-interest to a designated national." The term "confiscated" is defined as having the meaning given that term in Section 515.336 of Title 31 CFR. Part 515 of Title 31 CFR sets out the Cuban Assets Control Regulations (the "CACR"), which were enacted on 8 July 1963 under the Trading with the Enemy Act of 1917. Under these regulations, "designated national" is defined as Cuba, a national of Cuba or a specially designated national. "Confiscated" is defined as nationalized or expropriated by the Cuban Government on or after 1 January 1959 without payment of adequate and effective compensation.

5. Section 211(a)(1) relates to licensing regulations contained in the CACR. The CACR are administered by the Office of Foreign Assets Control ("OFAC"), an agency of the United States Department of the Treasury. Under United States law, all transactions

involving property under United States jurisdiction, in which a Cuban national has an interest, require a licence from OFAC. OFAC has the authority to grant either of two categories of licences, namely general licences and specific licences. A general licence is a general authorization for certain types of transactions set out in OFAC regulations. Such a licence is, in effect, a standing authorization for the types of transactions that are specified in the CACR. A specific licence, by contrast, is one whose precise terms are not set out in the regulations, so that a person wishing to engage in a transaction for which a general licence is not available must apply to OFAC for a specific licence.

6. Section 211 refers to Section 515.527 of Title 31 CFR. Prior to the entry into force of Section 211, a general licence was available under Section 515.527 for the registration and renewal of trademarks previously owned by Cuban nationals irrespective of whether such trademarks had been confiscated by the Cuban Government. . . .

7. On 10 May 1999, some six months after the entry into force of Section 211, the CACR were amended by adding a new subparagraph (a)(2) to Section 515.527, which effectively prohibits registration and renewal of trademarks and trade names used in connection with a business or assets that were confiscated without the consent of the original owner or bona fide successor-in-interest. This provision reads:

(a) (2) No transaction or payment is authorized or approved pursuant to paragraph (a)(1) of this section with respect to a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated, as that term is defined in section 515.336, unless the original owner of the mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.

8. The effect of Section 211, as read with the relevant provisions of the CACR, is to make inapplicable to a defined category of trademarks and trade names certain aspects of trademark and trade name protection that are otherwise guaranteed in the trademark and trade name law of the United States. In the United States, trademark and trade name protection is effected through

the common law as well as through statutes. The common law provides for trademark and trade name creation through use. The Trademark Act of 1946 (the "Lanham Act") stipulates substantive and procedural rights in trademarks as well as trade names and governs unfair competition. Section 211(b) refers to Sections 44(b) and (e) of the Lanham Act.

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Excerpts from a press release from USTR issued January 2, 2002, described the holding by the WTO.

The full text of the press release is available at *www.ustr.gov/releases/2002/01/02-01.htm*.

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Today's WTO report confirms the longstanding U.S. position that WTO intellectual property rights rules leave WTO Members free to protect trademarks by establishing their own trademark ownership criteria. The ruling does not call into question the distinction that the U.S. law in question (section 211 of the FY1999 Omnibus Appropriations Act) draws between original trademark owners and companies that acquire a trademark as part of a government confiscation.

In another key finding requested by the United States, the WTO report, issued by the Appellate Body, also overturned an earlier WTO panel report finding that section 211 denied parties fair and equitable judicial procedures to enforce trademark rights. It found, however, that the law's treatment of U.S. and Cuban companies is contrary to the national treatment and most-favored-nation obligations under WTO rules.

Today's report suggests that in the absence of discrimination a law along the lines of section 211 would be consistent with WTO rules, and therefore those trademark owners who currently enjoy protection under section 211 could continue to enjoy that protection.

* * * *

c. Foreign Sales Corporation Dispute

(1) Final Report of WTO Dispute Settlement Body

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. Available at *http://docsonline.wto.org/gen_search.asp*(WT/DS108/AB/R). The dispute was based on a challenge by the European Union in 1997 to foreign sales corporation ("FSC") provisions in U.S. tax law at that time. In response to a ruling of March 20, 2000, finding the FSC provisions of U.S. tax law to be an export subsidy inconsistent with WTO obligations, the United States had enacted the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 ("ETI Act"), signed into law November 15, 2000. Pub. L. No. 106–519, 114 Stat. 2423. The current decision resulted from a WTO dispute initiated by the EU on November 17, 2000, alleging that the ETI Act failed to eliminate the deficiencies in the FSC provisions. See discussion in *Digest 2001* at 653–663.

Testimony by Kenneth W. Dam, Deputy Secretary of the Treasury, before the U.S. Senate Finance Committee on July 30, 2002, explained the views of the United States on the decision, provided a history of the case, and described U.S. views on continuing aspects of the dispute.

The full text of the testimony is available at *www.state.gov/e/eb/rls/rm/2002/12385.htm*.

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On January 29, 2002, the WTO Dispute Settlement Body adopted a final report finding that the ETI provisions are inconsistent with the United States' obligations under the WTO. That decision is the culmination of a challenge brought by the European Union in late 1997 against the foreign sales corporation (FSC) provisions then contained in the U.S. tax law. However, the origins of this dispute go back almost 30 years, predating the World Trade

Organization itself. The United States has vigorously pursued this matter and defended its laws because of the importance of the provisions and principles at stake.

A WTO arbitration panel currently is considering the European Union's request for authority from the WTO to impose trade sanctions on $4.043 billion worth of U.S. exports. The arbitration panel is expected to issue its report on the appropriate level of trade sanctions in the next few weeks. Following the issuance of that report, the European Union will be in a position to receive authority to begin imposing trade sanctions on U.S. exports up to the level set by the arbitrators and the authority for such sanctions will continue until the United States rectifies the WTO violation.

This is an urgent matter that requires our immediate attention. The threat of substantial retaliatory sanctions against U.S. exports is not something that any of us takes lightly. Such sanctions, if imposed, would do real damage to U.S. businesses and American workers. And the imposition of such sanctions would have serious adverse consequences for the overall trade relationship between the United States and the European Union beyond those sectors directly targeted with sanctions, which would have a direct and detrimental effect on U.S. consumers. Of course the urgency is not just about the critical need to avert costly retaliation. The WTO has issued its final decision in this case, and we must comply with that decision. That is a matter of principle.

The President has spoken on this and his message is clear. The United States will honor its WTO obligations and will come into compliance with the recent WTO decision. To do so will require legislation to change our tax law. The Administration is committed to working closely with the Congress in the development and enactment of the legislation necessary to bring the United States into compliance with WTO rules.

The analysis of the current WTO rules reflected in the decision in the FSC/ETI case makes it apparent that legislation attempting to replicate FSC or ETI benefits will not pass muster in the WTO. Nor can we satisfy our WTO obligations and comply with WTO rules through "tweaks" to the ETI provisions. The WTO Appellate Body made clear that a benefit tied to export activity, such as is provided through the ETI provisions, is not permitted. Therefore,

it will not be fruitful to pursue again a replacement of the ETI provisions.

Addressing the WTO decision through the tax law will require real and meaningful changes to our current international tax laws. While the WTO decision is a bitter pill, we must look forward and take a fresh look at our tax laws and the extent to which they enhance or harm the position of the U.S. in the global marketplace. As we evaluate the changes we might consider, it is imperative that we make choices that will enhance—and not adversely affect—the competitive position of American workers and U.S.-based businesses in today's global marketplace.

In stating his commitment to compliance in this case, the President has said we must focus on enhancing America's competitiveness in the global marketplace because that is the key to protecting American jobs. At its core, this case raises fundamental questions regarding a level global playing field with respect to tax policy. The ETI provisions, like the FSC provisions that preceded them, represent an integral part of our larger system of international tax rules. These provisions were designed to help level the global playing field for U.S.-based businesses that are subject to those international tax rules. In modifying our tax laws to comply with this decision, we must not lose sight of that objective and what it means: the health of the US economy and the jobs of American workers.

Much can be done to rationalize our international tax rules through reforms both small and large. The need for reform of our international tax rules is something I know you recognize, Mr. Chairman. You have led the way on a bipartisan basis with proposals to reform our international tax rules.

The U.S. international tax rules can operate to impose a burden on U.S.-based companies that is disproportionate to the tax burden imposed by our trading partners on the foreign operations of their companies. The U.S. rules for the taxation of foreign-source income are unique in their breadth of reach and degree of complexity. The recent activity involving so-called corporate inversion transactions is evidence that the competitive disadvantage caused by our international tax rules is a serious issue with significant consequences for U.S. businesses and the U.S. economy. Foreign

acquisition of U.S. multinationals that arises out of distortions created by our international tax system raises similar concerns. We must address these tax disadvantages to reduce the tilt away from American workers and U.S.-based companies. And as we consider appropriate reform of our system of international tax rules, we should not underestimate the benefits to be gained from reducing the complexity of the current rules.

The bottom line is clear and simple. Our economy is truly global. U.S.-based companies must be able to compete in today's global marketplace. Our system of international tax rules should not disadvantage them in that competition. If we allow our international tax rules to act as an impediment to successful competition, the cost will be measured in lost opportunities and lost jobs here at home.

While we work toward the needed changes to our international tax rules, we must continue a dialogue with the European Union. We must take every step needed to ensure that this dispute does not further escalate to the detriment of the global trading environment. It is essential that we achieve a resolution of this matter that is clear, fair and final—a resolution that protects America's interests and satisfies our obligations under the WTO.

* * * *

Overview of the History of the WTO Case

The FSC provisions were enacted in 1984. They provided an exemption from U.S. tax for a portion of the income earned from export transactions. This partial exemption from tax was intended to provide U.S. exporters with tax treatment that was more comparable to the treatment provided to exporters under the tax systems common in other countries.

The FSC provisions were enacted to resolve a General Agreement on Tariffs and Trade (GATT) dispute involving a prior U.S. tax regime—the domestic international sales corporation (DISC) provisions enacted in 1971. Following a challenge to the DISC provisions brought by the European Union and a counterchallenge to several European tax regimes brought by the United

States, a GATT panel in 1976 ruled against all the contested tax measures. This decision led to a stalemate that was resolved with a GATT Council Understanding adopted in 1981 (the "1981 Understanding"). Pursuant to this 1981 Understanding regarding the treatment of tax measures under the trade agreements, the United States repealed the DISC provisions and enacted the FSC provisions.

The European Union formally challenged the FSC provisions in the WTO in November 1997. Consultations to resolve the matter were unsuccessful, and the EU challenge was referred to a WTO dispute resolution panel. In October 1999, the WTO panel issued a report finding that the FSC provisions constituted a violation of WTO rules. The United States appealed the panel report; the European Union also appealed the report. In February 2000, the WTO Appellate Body issued its report substantially upholding the findings of the panel.

Although the United States argued forcefully that the FSC provisions were blessed by the 1981 Understanding, the WTO panel disagreed, concluding that the 1981 Understanding had no continuing relevance in the interpretation of current WTO rules. The panel's analysis focused mainly on the application of the WTO Agreement on Subsidies and Countervailing Measures. The panel found that the FSC provisions constituted a prohibited export subsidy under the Subsidies Agreement.

In response to the WTO decision against the FSC provisions, the FSC Repeal and Extraterritorial Income Exclusion Act was enacted on November 15, 2000. The legislation repealed the FSC provisions and adopted in their place the ETI provisions. The legislation was intended to bring the United States into compliance with WTO rules by addressing the analysis reflected in the WTO decision. At the same time, the legislation also was intended to ensure that U.S. businesses not be foreclosed from opportunities in the global marketplace because of differences in the U.S. tax laws as compared to the laws of other countries.

Immediately following the enactment of the ETI Act, the European Union brought a challenge in the WTO. In August 2001, a WTO panel issued a report finding that the ETI provisions also violate WTO rules. The panel report contained sweeping

language and conclusory statements that had broad implications beyond the case at hand. Because of the importance of the issues involved and the troubling implications of the panel's analysis, the United States appealed the panel report. The WTO Appellate Body generally affirmed the panel's findings, although it modified and narrowed the panel's analysis in some respects. The Dispute Settlement Body adopted the report as modified by the Appellate Body on January 29, 2002.

The Appellate Body report makes four main findings with respect to the ETI provisions: (1) the ETI provisions constitute a prohibited export subsidy under the WTO Subsidies Agreement; (2) the ETI provisions constitute a prohibited export subsidy under the WTO Agriculture Agreement; (3) the limitation on foreign content contained in the ETI provisions violate the national treatment provisions of Article III:4 of GATT; and (4) the transition rules contained in the ETI Act violate the WTO's prior recommendation that the FSC subsidy be withdrawn with effect from November 1, 2000.

When it challenged the ETI Act in November 2000, the European Union simultaneously requested authority from the WTO to impose trade sanctions on $4.043 billion worth of U.S. exports. The United States responded by initiating a WTO arbitration proceeding on the grounds that the amount of trade sanctions requested by the European Union was excessive under WTO standards. This arbitration was suspended pending the outcome of the European Union's challenge to the WTO-consistency of the ETI Act, and resumed on January 29th with the Dispute Settlement Body's adoption of its final report. As I noted at the outset, the arbitration panel is expected to issue its report on the appropriate level of trade sanctions in the next few weeks and, following the issuance of that report, the European Union will be in a position to be authorized to begin imposing trade sanctions on U.S. exports up to the level set by the arbitrators.

Competitiveness and U.S. Tax Policy

The U.S. international tax rules have developed in a patchwork fashion, beginning during the 1950s and 1960s. They are founded

on policies and principles developed during a time when America's foreign direct investment was preeminent abroad, and competition from imports to the United States was scant. Today, we have a truly global economy, in terms of both trade and investment. The value of goods traded to and from the United States increased more than three times faster than GDP between 1960 and 2000, rising to more than 20 percent of GDP. The flow of cross-border investment, both inflows and outflows, rose from a scant 1.1 percent of GDP in 1960 to 15.9 percent of GDP in 2000.

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To understand the effect of U.S. tax policy on the competitiveness of U.S. business, we must consider how U.S. businesses compete in today's global marketplace. A U.S. business operating at home and abroad must compete in several ways for capital and customers. Competition may be among:

— U.S.-managed firms that produce within the United States;
— U.S.-managed firms that produce abroad;
— Foreign-managed firms that produce within the United States;
— Foreign-managed firms that produce abroad within the foreign country in which they are headquartered; and
— Foreign-managed firms that produce abroad within a foreign country different from the one in which they are headquartered.

These entities may be simultaneously competing for sales within the United States, within a foreign country against local foreign production (either U.S., local, or other foreign managed), or within a foreign country against non-local production. Globalization requires that U.S. companies be competitive both in foreign markets and at home.

Other elements of competition among firms exist at the investor level: U.S.-managed firms may have foreign investors and foreign-managed firms may have U.S. investors. Portfolio investment accounts for approximately two-thirds of U.S. investment abroad and a similar fraction of foreign investment in the United States. Firms compete in global capital markets as well as global consumer markets.

In a world without taxes, competition among these different firms and different markets would be determined by production costs. In a world with taxes, however, where countries make different determinations with respect to tax rates and tax bases, these competitive decisions inevitably are affected by taxes. Assuming other countries make sovereign decisions on how to establish their own tax systems and tax rates, it simply is not possible for the United States to establish a tax system that restores the same competitive decisions that would have existed in a world without taxes.

The United States can, for example, attempt to equalize the taxation of income earned by U.S. companies from their U.S. exports to that of U.S. companies producing abroad for the same foreign market. However, in equalizing this tax burden, it may be the case that the U.S. tax results in neither type of U.S. company being competitive against a foreign-based multinational producing for sale in this foreign market.

The manner in which balance is achieved among these competitive concerns changes over time as circumstances change. For example, as foreign multinationals have increased in their worldwide position, the likelihood of a U.S. multinational company competing against a foreign multinational in a foreign market has increased relative to the likelihood of U.S. export sales competing against sales from a U.S. multinational producing abroad. The desire to restore competitive decisions to those that would occur in the absence of taxation therefore may place greater weight today on U.S. taxes not impeding the competitive position of U.S. multinationals vis-à-vis foreign multinationals in the global marketplace. Similarly, while at one time U.S. foreign production may have been thought to be largely substitutable with U.S. domestic production for export, today it is understood that foreign production may provide the opportunity for the export of firm-specific know-how and domestic exports may be enhanced by the establishment of foreign production facilities through supply linkages and service arrangements. Ensuring the ability of U.S. multinationals to compete in foreign markets thus provides direct opportunities at home for American workers.

Given the significance today of competitiveness concerns, it is important to understand the major features of the U.S. tax system

and how they differ from those of our major trading partners. The primary features of the U.S. tax system considered here are: (i) the taxation of worldwide income; (ii) the current taxation of certain types of active foreign-source income; (iii) the limitations placed on the use of foreign tax credits; and (iv) the unintegrated taxation of corporate income at both the entity level and the individual level.

U.S. Worldwide Tax System

The United States, like about half of the OECD countries, including the United Kingdom and Japan, operates a worldwide system of income taxation. Under this worldwide approach, U.S. citizens and residents, including U.S. corporations, are taxed on all their income, regardless of where it is earned. Income earned from foreign sources potentially is subject to taxation both by the country where the income is earned, the country of source, and by the United States, the country of residence. To provide relief from this potential double taxation, the United States allows taxpayers a foreign tax credit that reduces the U.S. tax on foreign-source income by the amount of foreign income and withholding taxes paid on such income.

The U.S. worldwide system of taxation is in contrast to the territorial tax systems operated by the other half of the OECD countries, including Canada, Germany, France, and the Netherlands. Under these territorial tax systems, domestic residents and corporations generally are subject to tax only on their income from domestic sources. A domestic business is not subject to domestic taxation on the active income earned abroad by a foreign branch or on dividends paid from active income earned by a foreign subsidiary. A domestic corporation generally is subject to tax on other investment-type income, such as royalties, rent, interest, and portfolio dividends, without regard to where such income is earned; because this passive income is taxed on a worldwide basis, relief from double taxation generally is provided through either a foreign tax credit or a deduction allowed for foreign taxes imposed on such income. This type of territorial tax system sometimes is referred to as a "dividend exemption" system because active foreign business income repatriated in the form of a dividend is exempt

from taxation. By contrast, a pure territorial system would provide an exemption for all income received from foreign sources, including investment-type income. Such pure territorial systems have existed only in a few developing countries.

Differences between a worldwide tax system and a territorial system can affect the ability of U.S.-based multinationals to compete for sales in foreign markets against foreign-based multinationals. The key difference between the two systems is which tax rate—source country or home country—applies to foreign-source income. Under a worldwide tax system, repatriated foreign income is taxed at the higher of the source country rate or the residence country rate. In contrast, foreign income under a territorial tax system is subject to tax at the source country rate. The effect of this difference depends on how the tax rate in the country where the income is earned compares to the tax rate in the company's home country. The effect on U.S.-based businesses depends upon their mix of foreign-source income, but the imposition of residual U.S. tax on income earned abroad can impose a cost for U.S. businesses that is not imposed on their foreign competitors. Differences between these systems also can affect decisions about whether and when to repatriate earnings, which in turn affect investment decisions in the United States.

It is important to note that both worldwide and territorial systems involve the taxation of income. The complexities present in taxing income generally are heightened in determining the taxation of income from multinational activities, where in addition to measuring the income one must determine its source (foreign or domestic). This complexity affects both tax administrators and taxpayers. Indeed, the U.S. international tax rules have been identified as one of the largest sources of complexity facing U.S. corporate taxpayers.

Given the complexity of the task of taxing multinational income under a worldwide or territorial system on top of the general complexity of the income tax system, some consideration might be given to alternative tax bases other than income. Other OECD countries typically rely on taxes on goods and services, such as under a value added tax, for a substantial share of tax revenues. In the European OECD countries, for example, these taxes raise

nearly five times the amount of revenue as does the U.S. corporate income tax as a share of GDP.

Comparison With Other Worldwide Tax Systems

As described above, about half of the OECD countries employ a worldwide tax system as does the United States. However, the details of our system are such that U.S. multinationals may be disadvantaged when competing abroad against multinational companies established in other countries using a worldwide tax system. This is because the United States employs a worldwide tax system that, unlike other worldwide systems, taxes active forms of business income earned abroad before it has been repatriated and more strictly limits the use of the foreign tax credits that prevent double taxation of income earned abroad.

Limitations on Deferral

Under the U.S. international tax rules, income earned abroad by a foreign subsidiary generally is subject to U.S. tax at the U.S. parent corporation level only when such income is distributed by the foreign subsidiary to the U.S. parent in the form of a dividend. An exception to this general rule is provided with the rules of subpart F of the Code, under which a U.S. parent is subject to current U.S. tax on certain income of its foreign subsidiaries, without regard to whether that income is actually distributed to the U.S. parent. The focus of the subpart F rules is on passive, investment-type income that is earned abroad through a foreign subsidiary. However, the reach of the subpart F rules extends well beyond passive income to encompass some forms of income from active foreign business operations. No other country has rules for the immediate taxation of foreign-source income that are comparable to the U.S. rules in terms of breadth and complexity. The effect of these rules is to force U.S.-based companies either to structure their operations in a manner that is less than optimal from a business perspective or to incur current U.S. tax in addition to the local tax. The foreign-based companies against which our companies must compete do not face this same tradeoff.

Several categories of active business income are covered by the subpart F rules. Under subpart F, a U.S. parent company is subject to current U.S. tax on income earned by a foreign subsidiary from certain sales transactions. Accordingly, a U.S. company that uses a centralized foreign distribution company to handle sales of its products in foreign markets is subject to current U.S. tax on the income earned abroad by that foreign distribution subsidiary. In contrast, a local competitor making sales in that market is subject only to the tax imposed by that country. Moreover, a foreign competitor that similarly uses a centralized distribution company to make sales into the same markets also generally will be subject only to the tax imposed by the local country. This rule has the effect of imposing current U.S. tax on income from active marketing operations abroad. U.S. companies that centralize their foreign distribution facilities therefore face a tax penalty not imposed on their foreign competitors. This increases the cost of selling goods that are produced in the United States.

The subpart F rules also impose current U.S. taxation on income from certain services transactions performed abroad. In addition, a U.S. company with a foreign subsidiary engaged in shipping activities or in certain oil-related activities, such as transportation of oil from the source to the consumer, will be subject to current U.S. tax on the income earned abroad from such activities. In contrast, a foreign competitor engaged in the same activities generally will not be subject to current home-country tax on its income from these activities. These rules operate to subject U.S.-based companies to an additional tax cost on some classes of income arising from active business operations structured and located in a particular country for business reasons wholly unrelated to any tax considerations.

Limitations on Foreign Tax Credits

Under the worldwide system of taxation, income earned abroad potentially is subject to tax in two countries—the taxpayer's country of residence and the country where the income was earned. Relief from this potential double taxation is provided through the

mechanism of a foreign tax credit, under which the tax that otherwise would be imposed by the country of residence may be offset by tax imposed by the source country. The United States allows U.S. taxpayers a foreign tax credit for taxes paid on income earned outside the United States.

The foreign tax credit may be used only to offset U.S. tax on foreign-source income and not to offset U.S. tax on U.S.-source income. The rules for determining and applying this limitation are detailed and complex and can have the effect of subjecting U.S.-based companies to double taxation on their income earned abroad. The current U.S. foreign tax credit regime also requires that the rules be applied separately to separate categories or "baskets" of income. Foreign taxes paid with respect to income in a particular category may be used only to offset the U.S. tax on income from that same category. Computations of foreign and domestic source income, allocable expenses, and foreign taxes paid must be made separately for each of these separate foreign tax credit baskets, further adding to the complexity of the system. Moreover, the U.S. foreign tax credit regime requires the allocation of U.S. interest expense against foreign-source income in a manner that reduces the foreign tax credit limitation by understating foreign income. The practical effect of these interest allocation rules can be the denial of a deduction for interest expense incurred in the United States, which increases the cost of investment and expansion here at home.

Other countries do not have restrictions and limitations on foreign tax credits that are nearly as extensive as our rules. These rules can have the effect of denying U.S.-based companies the full ability to credit foreign taxes paid on income earned abroad against the U.S. tax liability with respect to that income. The result is that U.S.-based companies are subject to just the double taxation that the foreign tax credit is intended to eliminate.

U.S. Corporate Taxation

While concern about the effects of the U.S. tax system on international competitiveness may focus on the tax treatment of foreign-source income, competitiveness issues arise in very much

the same way in terms of the general manner in which corporate income is subject to tax in the United States.

One aspect of the U.S. tax system is that the income from an equity-financed investment in the corporate sector is taxed twice. Equity income, or profit, is taxed first under the corporate income tax. Profit is taxed again under the individual income tax when received by the shareholder as a dividend or as a capital gain on the appreciation of corporate shares. In contrast, most other OECD countries offer some form of integration, under which corporate tax payments are either partially or fully taken into consideration when assessing shareholder taxes on this income, eliminating or reducing the double tax on corporate profits.

The non-integration of corporate and individual tax payments on corporate income applies equally to domestically earned income or foreign-source income of a U.S. company. This double tax increases the "hurdle" rate, or the minimum rate of return required on a prospective investment. In order to yield a given after-tax return to an individual investor, the pre-tax return must be sufficiently high to offset both the corporate level and individual level taxes paid on this return. Whether competing at home against foreign imports or competing abroad through exports from the United States or through foreign production, the double tax makes it more difficult for the U.S. company to compete successfully against a foreign competitor.

As noted above, most OECD countries offer some form of tax relief for corporate profits. This integration typically is provided by reducing personal income tax payments on corporate distributions rather than by reducing corporate level tax payments. International comparisons of corporate tax burdens, however, sometimes fail to account for differences in integration across countries and consider only corporate level tax payments. To be meaningful, comparisons between the total tax burden faced on corporate investments by U.S. companies and those of foreign multinational companies must take into account the total tax burden on corporate profits at both the corporate and individual levels.

* * * *

As indicated in Secretary Dam's testimony, the United States had continued to contest the amount of trade sanctions claimed by the European Union in the dispute. The United States instituted an arbitration proceeding to challenge the European Union's claim of $4.043 billion. On February 14, 2002, the United States filed a submission asserting that the proper amount of sanctions was no more than $956 million. Excerpts below from a press release issued by the Office of the U.S. Trade Representative that day describe the U.S. submission.

The full text of the USTR press release is available at *http://www.ustr.gov/releases/2002/02/02-20.pdf*. The U.S. submission is available at *www.ustr.gov/enforcement/briefs.shtml*

In today's additional submission, the United States laid out in greater detail its views regarding the proper method for calculating sanctions in the FSC dispute, including the following key points:

- The amount of sanctions to which the EU is entitled must be based on the purported impact of the FSC on EU trade interests.
- An appropriate method of calculating the alleged trade impact on the EU in this case is to allocate to the EU a portion of the total amount of the FSC subsidy based on the EU's share of total non-U.S. global goods production.
- Applying this method, and after making appropriate adjustments to the total amount of the FSC subsidy estimated by the EU, the appropriate amount of sanctions is no more than $956 million.

The U.S. submission will be available on USTR's website. The EU also made a submission today, but has not made it public. Both the United States and the EU will file rebuttal submissions on February 26.

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(2) Decision of the arbitrator on amount of sanctions

On August 30, 2002, the WTO released the decision of the arbitrator in the Foreign Sales Corporation dispute. The arbitrator ruled that the European Union could impose the $4 billion in trade sanctions that it had claimed. Excerpts below from a USTR press release of the same day describe the U.S. reaction to the judgment.

The full text of the press release is available at *www.ustr.gov/releases/2002/08/02-85.pdf*. The full text of the arbitrator's decision is available at *www.state.gov/e/eb/rls/rm/2002/12385.htm*. U.S. submissions in the case are available at *www.ustr.gov/enforcement/briefs.shtml*.

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The United States contended that sanctions should have been limited to $1 billion based on the actual impact of the FSC provisions on EU commercial interests.

"I'm disappointed that the arbitrator did not accept the lower figure put forward by the United States. We believe that $1 billion is much more accurate," said United States Trade Representative Robert B. Zoellick. "Nevertheless, the key point, as the President has said, is that the Executive branch will work with Congress to fully comply with our WTO obligations. I believe that today's findings will ultimately be rendered moot by U.S. compliance with the WTO's recommendations and rulings in this dispute."

* * * *

"One of the ironies of this case," said Zoellick, "is that when the dust has settled, we hope to find that the competitiveness of U.S. firms has been strengthened, rather than diminished."

Under WTO rules, the WTO Dispute Settlement Body must provide its formal approval before the EU can actually impose trade sanctions. However, there is no deadline by which the EU must submit such a request, and EU officials previously have indicated that they would refrain from imposing sanctions so long

as the United States is making progress on eliminating the FSC subsidy.

* * * *

d. Establishment of panels related to safeguard measures on imports of certain steel products

(1) U.S. definitive safeguard measures on imports of certain steel products

On June 3, 2002, the WTO Dispute Settlement Body established a panel to examine Proclamation No. 7529, entitled "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products," issued by President George W. Bush on March 5, 2002, available at *www.wto.org/english/news_e/news02_e/dsb_03june02_e.htm*. The panel was established in response to a request, among others, by the European Community of May 7, 2002. As stated in the EC request for establishment of the panel,

> By [this proclamation] the United States of America ("the US") imposed definitive safeguard measures in the form of an increase in duties on imports of certain steel products and in the form of a tariff rate quota on imports of "slabs". These measures are effective as of 20 March 2002.
>
> In the view of the European communities, these measures and the reports of the US International Trade Commission ("the ITC") to which they refer are inconsistent with the US obligations under the covered agreements within the meaning of Article 1.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

WT/DS248/12, May 8, 2002. The panel's review was pending at the end of 2002.

The proclamation issued by President Bush at issue in this case, published at 67 Fed. Reg. 10,953 (Mar. 7, 2002),

was based on a report by the United States International Trade Commission ("ITC") under section 202 of the Trade Act of 1974, as amended ("Trade Act"), 19 U.S.C. § 2252, transmitted to the President on December 19, 2001. In its report, the ITC made determinations under § 202(b) of the Trade Act that certain steel 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 domestic industries producing like or directly competitive articles. The President, acting pursuant to § 203 of the Trade Act, 19 U.S.C. § 2253, determined to implement safeguard measures against such steel products imported from countries other than Canada, Israel, Jordan, and Mexico, as provided in the excerpts from the proclamation provided below.

Documents related to U.S. actions on steel products are available at *www.ustr.gov/sectors/industry/steel.shtml.*

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7. Pursuant to section 203 of the Trade Act (19 U.S.C. 2253), and after taking into account the considerations specified in section 203(a)(2) of the Trade Act and the ITC supplemental report, I have determined to implement action of a type described in section 203(a)(3) (a "safeguard measure") with regard to [enumerated] steel products:

* * * *

The steel products listed in clauses (i) through (ix) of subdivision (b) of U.S. Note 11 to subchapter III of chapter 99 of the HTS ("Note 11") in the Annex to this proclamation were excluded from the determinations of the ITC described in paragraph 2, and are excluded from these safeguard measures. I have also determined to exclude from these safeguard measures the steel products listed in the subsequent clauses of subdivision (b) of Note 11 in the Annex to this proclamation.

8. Pursuant to section 312(a) of the NAFTA Implementation Act (19 U.S.C. 3372(a)), I have determined after considering the

report and supplemental report of the ITC that imports from each of Canada and Mexico of certain flat steel, tin mill products, hot-rolled bar, cold-finished bar, rebar, certain tubular products, carbon and alloy fittings, stainless steel bar, stainless steel rod, and stainless steel wire, considered individually, do not account for a substantial share of total imports or do not contribute importantly to the serious injury or threat of serious injury found by the ITC. Accordingly, pursuant to section 312(b) of the NAFTA Implementation Act (19 U.S.C. 3372(b)), I have excluded certain flat steel, tin mill products, hot-rolled bar, cold-finished bar, rebar, certain tubular products, carbon and alloy fittings, stainless steel bar, stainless steel rod, and stainless steel wire the product of Mexico or Canada from the actions I am taking under section 203 of the Trade Act.

9. Pursuant to section 203 of the Trade Act (19 U.S.C. 2253), the actions I have determined to take shall be safeguard measures in the form of:

(a) a tariff rate quota on imports of slabs described in paragraph 7, imposed for a period of 3 years plus 1 day, with annual increases in the within-quota quantities and annual reductions in the rates of duty applicable to goods entered in excess of those quantities in the second and third years; and
(b) an increase in duties on imports of certain flat steel, other than slabs (including plate, hot-rolled steel, cold-rolled steel and coated steel), hot-rolled bar, cold-finished bar, rebar, certain welded tubular products, carbon and alloy fittings, stainless steel bar, stainless steel rod, tin mill products, and stainless steel wire, as described in paragraph 7, imposed for a period of 3 years plus 1 day, with annual reductions in the rates of duty in the second and third years, as provided in the Annex to this proclamation.

10. The safeguard measures described in paragraph 9 shall not apply to the products listed in clauses following clause (ix) in subdivision (b) of Note 11 in the Annex to this proclamation.

11. These safeguard measures shall apply to imports from all countries, except for products of Canada, Israel, Jordan, and Mexico.

12. These safeguard measures shall not apply to imports of any product described in paragraph 7 of a developing country that is a member of the World Trade Organization (WTO), as long as that country's share of total imports of the product, based on imports during a recent representative period, does not exceed 3 percent, provided that imports that are the product of all such countries with less than 3 percent import share collectively account for not more than 9 percent of total imports of the product. If I determine that a surge in imports of a product described in paragraph 7 of a developing country WTO member undermines the effectiveness of the pertinent safeguard measure, the safeguard measure shall be modified to apply to such product from such country.

13. The in-quota quantity in each year under the tariff rate quota described in paragraph 9 shall be allocated among all countries except those countries the products of which are excluded from such tariff rate quota pursuant to paragraphs 11 and 12.

14. Pursuant to section 203(a)(1)(A) of the Trade Act (19 U.S.C. 2253(a)(1)(A)), I have further determined that these safeguard measures will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs. If I determine that further action is appropriate and feasible to facilitate efforts by the pertinent domestic industry to make a positive adjustment to import competition and to provide greater economic and social benefits than costs, or if I determine that the conditions under section 204(b)(1) of the Trade Act are met, I shall reduce, modify, or terminate the action established in this proclamation accordingly. In addition, if I determine within 30 days of the date of this proclamation, as a result of consultations between the United States and other WTO members pursuant to Article 12.3 of the WTO Agreement on Safeguards that it is necessary to reduce, modify, or terminate a safeguard measure, I shall proclaim the corresponding reduction, modification, or termination of the safeguard measure within 40 days.

15. Section 604 of the Trade Act, as amended (19 U.S.C. 2483), authorizes the President to embody in the HTS the substance of the relevant provisions of that Act, and of other acts affecting import treatment, and actions thereunder, including the removal,

modification, continuance, or imposition of any rate of duty or other import restriction.

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(2) EC steel restrictions

On September 16, 2002, the WTO Dispute Settlement Body established a panel to examine the European Community's provisional safeguard measures on imports of certain steel products, imposed in response to the U.S. definitive safeguard measures discussed *supra*. The panel was established at the request of the United States, which asserted that the safeguard measures were inconsistent with WTO rules. The United States argued that the EC had imposed measures without following the investigatory process and without clear evidence that increased imports were causing or threatening to cause serious injury. *See www.wto.org/english/news_e/news02_e/dsb_17sep02_e.htm*. The action was pending at the end of 2002.

2. U.S. Proposals in World Trade Organization Negotiations

a. Request for public comment

On March 19, 2002, the Trade Policy Staff Committee of the Office of the United States Trade Representative published a notice in the Federal Register seeking public comments regarding the Doha Multilateral Trade Negotiations and Agenda in the WTO. 67 Fed. Reg. 12,637 (March 19, 2002). The notice requested written public comments on general U.S. negotiating objectives as well as country- and item-specific priorities for the negotiations and work program launched at the WTO's Fourth Ministerial Conference in November 2001. Excerpts below from the Federal Register notice describe the agenda established at Doha.

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The Doha Development Agenda agreed to at the WTO's Fourth Ministerial Meeting establishes a negotiating agenda that is to conclude within three years (not later than 1 January 2005), and sets out a certain number of issues to be considered further at the next ministerial meeting of the WTO in 2003. In addition to the mandated negotiations in agriculture and services, the negotiation of a multilateral system of notification and registration of geographical indications for wine and spirits, and the negotiation of improvements to the Dispute Settlement Understanding (DSU), negotiations at Doha were launched on market access for non-agricultural products; WTO rules (on antidumping, subsidies, fisheries subsidies, and regional trade agreements); and negotiations on limited aspects of the relationship between WTO and multilateral environmental agreements. The Doha agenda foresees further work on the so-called Singapore issues of Trade and Competition, Trade and Investment, Transparency in Government Procurement, and Trade Facilitation, leading to decisions on negotiations by the time of the WTO's Fifth Ministerial Meeting in 2003. In addition, the Doha agenda focuses on a variety of issues relating to the regular work program of the WTO which have a bearing on the negotiations, including: further work on implementation of the existing Agreements; integration of developing countries into the multilateral trade system; trade-related technical assistance and capacity building; small economies; special and differential treatment; treatment of least-developed countries; electronic commerce; trade, debt and finance; trade and technology, and the work of the Committee on Trade and Environment (CTE).

b. Proposals submitted to WTO

(1) Zero tariffs on all consumer and industrial products

On November 26, 2002, the United States announced a proposal calling on WTO members to eliminate tariffs on all industrial and consumer goods worldwide by 2015, as a component of the WTO negotiations launched in Doha, Qatar, in 2001. The excerpts below from the press release

from the Office of the U.S. Trade Representative describe the proposal and the U.S. view that it would benefit both developed and developing countries.

The press release and other information on the proposal is available at *www.ustr.gov/new/Zero_Tariff.htm*

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This proposal, combined with the far-reaching U.S. agricultural reform proposal submitted to the WTO in July, would eliminate tariffs on the nearly $6 trillion in annual world goods trade, lifting the economic fortunes of workers, families, businesses, and consumers. These two proposals call on all WTO members to advance free trade and complete the tariff-cutting work that began more than 50 years ago with the creation of the General Agreement on Tariffs and Trade in 1948.

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The U.S. proposal would eliminate tariffs on a full-range of consumer and industrial goods ranging from women's shoes, to tractors, to children's toys. The proposal, which will be presented to WTO members next week in Geneva, Switzerland, calls for a two-step approach to tariff elimination. First, WTO members must cut and harmonize their tariffs in the five year period from 2005 to 2010. Specifically, WTO members would eliminate all tariffs at or below 5 percent by 2010, cut all other tariffs through a "tariff equalizer" formula to less than 8 percent by 2010, and eliminate tariffs in certain highly traded industry sectors as soon as possible, but not later than 2010.

The second step calls for all members to make equal annual cuts in remaining tariffs between 2010 and 2015. These cuts would result in zero tariffs. The proposal also calls for a separate program to identify and eliminate non-tariff barriers, which would run on a parallel track with the negotiations on industrial tariffs. The United States will put forward an initial list of such barriers in January.

The elimination of U.S. tariffs would significantly benefit U.S. families and consumers through lower import taxes and a more competitive economy. Last year alone, hidden import taxes cost

American consumers $18 billion. Duty-free trade would eliminate these hidden costs and lower prices for consumers. While this proposal would offer substantial benefits to all Americans, it would particularly help low-income families. A recent study by the Progressive Policy Institute found that cutting U.S. import taxes especially benefits single-parent, low-income families, who typically pay a higher proportion of their income on import taxes than other households. A University of Michigan study found that the U.S. economy would expand by $95 billion as a result of tariff-free trade—contributing to job-creation and higher wages.

U.S. consumer and industrial goods exports totaled more than $670 billion in 2001. U.S. exports support an estimated 12 million American jobs, and jobs supported by goods exports typically pay 13 percent to 18 percent higher than the average U.S. wage. The University of Michigan study also found that the elimination of industrial tariffs by other countries could increase U.S. exports by $83 billion annually. Highly-traded goods exports, such as chemicals, paper, and scientific equipment, which are targeted in the U.S. proposal for expedited tariff elimination, account for 60 percent of total U.S. goods exports.

Developing countries also have much to gain from a tariff-free world. According to a World Bank estimate, there would be a world income gain of $832 billion from free trade in all goods including agriculture, of which $539 billion (65 percent) would flow to developing countries. This represents $544 for a family of four. The World Bank estimates that free trade in goods and services could help lift 300 million people out of poverty—a number greater than the entire population of the United States.

The U.S. proposal on consumer and industrial goods tariffs results in tariff-free trade for 91 percent of world goods trade. For the remaining 9 percent of world goods trade, the U.S. agriculture proposal would cut global tariffs by 76 percent in five years as a step towards eventual tariff elimination.

Background:
The reduction and elimination of tariffs on consumer and industrial goods is a component of the WTO negotiations launched in Doha, Qatar in 2001 to be completed by January 1, 2005.

Throughout the year, United States leadership has continued to spur momentum on the Doha Development Agenda in the WTO:

— On July 1, the United States announced proposals for liberalizing global trade in services, designed to remove foreign barriers in areas such as financial services, telecommunications, and environmental services.
— On July 25, the United States became the first WTO member to put forward a comprehensive agricultural trade reform proposal, calling for elimination of export subsidies, cuts of $100 billion in annual allowed global trade-distorting domestic subsidies, and lowering average allowed global tariffs from 62 percent to 15 percent. The United States also proposed that WTO members agree in this negotiation to a specific date for elimination of agricultural tariffs and trade-distorting domestic support.
— On August 9, the United States submitted a proposal to expand transparency and public access to World Trade Organization dispute settlement proceedings. The proposal would open WTO dispute settlement proceedings to the public for the first time and give greater public access to briefs and panel reports.
— On October 17, the United States submitted a paper highlighting the importance of strengthening transparency and due process in the application of trade remedies (antidumping, subsidies, and safeguard actions). It addresses the basic concepts and principles of the trade remedy rules against unfair trade, and the importance of tackling the trade-distorting practices that are frequently the root causes of unfair trade. The U.S. also submitted a paper presenting a number of ideas and recommendations for addressing trade- and market-distorting practices in the steel sector.

(2) Agriculture

The comprehensive agricultural trade reform proposal by the United States, referred to in (1) above, called for eliminating export subsidies, cutting allowed trade-distorting domestic

subsidies, and lowering average allowed global tariffs. The United States also proposed negotiations on a sector-specific basis on further reform commitments. Excerpts below from a fact sheet made available on August 23, 2002, describe the proposal in greater detail.

The fact sheet is available at *www.state.gov/g/oes/rls/fs/2002/12963.htm.*

The United States is proposing ambitious reforms for agricultural trade in the World Trade Organization (WTO) negotiations. Taken as a package, the U.S. proposal on export competition, market access and domestic support would result in reductions in trade barriers for agricultural products, greater equity in world agriculture, and expanding growth opportunities for the sale of agricultural products.

The United States is proposing a two-phase process:

The first phase eliminates export subsidies and reduces worldwide tariffs and trade-distorting domestic support over a five-year period. This would be accomplished by harmonizing tariffs and trade-distorting domestic support at substantially lower levels then what is currently allowed.

The second phase is the eventual elimination of all tariffs and trade-distorting domestic support.

Export Competition

Export Subsidies. The United States proposes the elimination of export subsidies, with reductions phased in over a five-year period in equal annual increments.

Current WTO rules cap annual budgetary outlays on export subsidies and the quantity of subsidized exports, on a product-specific basis. Specific caps on the use of export subsidies were derived from export subsidy activity in the 1986–1990 period. Consequently, the European Union (EU) has recourse to extensive use of export subsidies, and spent over $2 billion in 2000. The United States also has the ability to use substantial amounts of export subsidies for certain products. However, the United States only spent $20 million in 2000.

State Trading Enterprises. The United States proposes elimination of export monopolies, thus allowing any producer, distributor, or processor to export agricultural products. The United States proposes ending special financial privileges granted state traders and expanding their WTO transparency obligations.

WTO rules allow for state trading enterprises such as the Canadian Wheat Board to benefit from special rights or privileges in export sales, including special financing privileges. These privileges can create perverse incentives for exporters and producers that result in market distortions, and can hide export subsidy activity.

Export Taxes. The Unites States proposes prohibiting export taxes on agricultural products. An exception would be made for developing countries for revenue-generating purposes under certain conditions.

Current WTO rules allow countries to impose export taxes on agricultural products with few restrictions. These taxes can contribute to market distortions, particularly when applied during periods of global short supply or when they are used to discourage exports of basic products and encourage exports of semi-processed and processed products. The United States is constitutionally prohibited from levying export taxes.

Export Credits, Credit Guarantees, and Insurance. The United States proposes the establishment of specific rules to govern export credit activity by identifying permissible practices across the range of tools currently employed by WTO members. Practices that are inconsistent with these disciplines would be considered export subsidies and subject to the strict rules prohibiting export subsidies.

Current WTO rules allow for the use of export credit programs, including those with a subsidy element, as long as they are consistent with multilateral disciplines. A number of countries use export credit programs in agriculture, including the United States, employing a broad range of specific practices. In order to guard against circumvention of export subsidy disciplines, WTO members will develop specific disciplines on export credit programs.

Food Aid. The United States proposes to expand reporting requirements in the WTO to increase transparency of food aid

activities and to strengthen the market displacement analysis in international organizations charged with reviewing food aid activity.

WTO rules allow for the use of food aid, as long as food aid practices are consistent with guidelines established under the Food Aid Convention and the Food and Agriculture Organization. In order to guard against circumvention of export subsidy disciplines, some WTO members have proposed reviewing food aid disciplines in the negotiations.

Market Access

Tariffs: The United States proposes the use of a harmonizing formula (the "Swiss formula") for reducing all agricultural tariffs (out-of-quota duties and tariff-only items) that will cut high tariffs more than low tariffs, ensuring no individual tariff exceeds 25 percent after a five year phase in period. The United States proposes that tariff cuts be implemented from applied rates and that tariff application be simplified to either single ad valorem or specific tariffs. The United States proposes that WTO members agree in the negotiations to a specific date for the eventual elimination of all agricultural tariffs.

Current WTO rules require all countries to cap the maximum tariff that can be applied on any product.

While tariffs have come down in recent years, the level of allowed tariff is often substantial. The world average on agricultural products is 62 percent, while the U.S. average agricultural tariff is 12 percent.

Tariff-Rate Quotas (TRQs). The United States proposes expanding all TRQs by 20 percent and eliminating in-quota duties, phased in over a five-year period. The United States proposes tightening rules on TRQ administration to encourage quota-fill and greater transparency, including by prohibiting certain restrictions on imports and requiring the establishment of TRQ reallocation mechanisms. The United States proposes reserving a share of TRQ increases for non-traditional developing country suppliers.

A number of WTO Members allow a specific quantity of imports access at a low tariff rate, with all other imports subject

to a higher tariff—a TRQ. The United States maintains TRQs for beef, dairy, peanuts, sugar, tobacco, and cotton.

State Trading Enterprises. The United States proposes expanding trading rights to allow any interested entity to import products. The United States proposes, where TRQs exist, that a growing share of import activity under the TRQs be directed to entities other than those affiliated with the government.

Current WTO rules allow countries to channel imports through a single entity, creating opportunities for import restrictions and resulting in unmet demand for import products.

Special Agricultural Safeguard. The United States proposes elimination of this special safeguard.

Current WTO rules allow for the application of additional tariffs when triggered by a surge of imports or a decline in price, for a specific list of products. In the United States this safeguard can be used for beef, dairy, peanuts, sugar, and cotton products but has not been used in any meaningful way. The United States has identified the need for WTO members to improve import relief mechanisms for seasonal and perishable products in the context of the WTO negotiations.

Domestic Support

Trade-Distorting Domestic Support: The United States proposes using a formula to limit all countries' use of trade-distorting support to 5 percent of the total value of agricultural production, with reductions made from current caps over a five-year period. The United States proposes simplifying the current system of calculating trade-distorting domestic support by including trade-distorting support linked to production limitations against the WTO cap. The United States proposes that WTO members agree in the negotiations to a specific date for the elimination of all trade-distorting support.

Current WTO rules distinguish between trade-distorting support, and non-trade distorting support. Trade-distorting support that is subject to the cap generally consists of measures that distort producers' incentives, such as price supports and input subsidies, leading to over-production and distorting international markets. Trade-distorting support linked to production limitations is

currently not included against the annual cap. The allowed levels of trade-distorting support were derived from subsidy activity in the 1986–1988 period. The EU can provide over $60 billion annually in trade-distorting domestic support, and provides substantial support through so-called production-limiting programs. Japan can provide over $30 billion. The U.S. limit is $19 billion. Most other countries have very minimal allowances for trade-distorting support, although some small European countries provide a substantial level of support relative to the size of their agricultural economy. Current rules for excluding low levels of support would be maintained under the U.S. proposal.

Non-Trade Distorting Support ("Green Box"). The United States proposes maintaining the basic criteria for non-trade distorting support.

Non-trade distorting support generally consists of measures delinked from production incentives, such as food stamps, research, extension, pest and disease control, and delinked direct payments. There are no caps on non-trade distorting support, as long as policies are consistent with specific criteria designed to minimize production distortions.

Sectoral Initiatives

The United States proposes that WTO Members engage in negotiations on a sector-specific basis on further reform commitments that go beyond the basic reductions that will apply to all products. These would include deeper tariff reductions, product-specific limits on trade-distorting domestic support, and other commitments to more effectively address the trade-distorting practices in the affected commodity sectors.

Special and Difference Treatment

GATT and WTO negotiations have traditionally recognized that developing countries, and in particular least developed countries, may require special and differential treatment under trade rules to give them more time to adjust to competition and to allow mechanisms to address economic development needs. A number of countries have proposed specific approaches for including special and differential treatment in these WTO negotiations.

The United States and developing countries share many interests in these negotiations, and U.S. proposals will yield many benefits for farmers in developed and developing countries alike. These include: elimination of export subsidies, continuation of export credit and food aid programs, tariff reductions and reducing trade-distorting domestic support.

Regarding market access, the United States proposes providing to nontraditional developing country suppliers a share of the expansion in the TRQ quantities. Under export competition, the United States proposes that only developing countries would be able to use export taxes. Concerning domestic support, the United States proposes identifying specific support programs oriented towards subsistence, resource-poor and low-income farmers that would be exempt from subsidy limits. The United States will continue to engage with developing countries to address their transitional and development objectives consistent with the overall objectives of liberalizing world agricultural trade and reducing disparities that exist in protection and trade-distorting support.

(3) Export Credits

On November 20, 2002, the United States submitted its proposal to establish disciplines to govern the provision of officially supported export credits, export credit guarantees, and export credit insurance. The U.S. submission is provided below in full, and is available at *http://usinfo.state.gov/topical/econ/wto/exportcredits021120htm*.

The United States proposes, as part of the comprehensive reform of trade-distorting measures under the three pillars, the following disciplines on export credits, credit guarantees, and export credit insurance.

1. Consistency with Article 10.2

This Article establishes internationally agreed disciplines to govern the provision of officially supported export credits, export credit

guarantees, and export credit insurance programs in accordance with Article 10.2 of the Uruguay Round Agreement on Agriculture. (Such provision hereafter is referred to as "export financing".) Agricultural products for the purpose of this Article are those listed in Annex 1 of the Uruguay Round Agreement on Agriculture and the products thereof.

2. Scope of Article

These disciplines apply to all forms of official support including direct credits/financing; refinancing; interest-rate support; export credit insurance and guarantees; deferred invoicing; and any other form of involvement, direct or indirect, by providers of official support. Official support may exist although governments do not make any payment to the after-mentioned institutions or bodies.

Providers of official support to be subject to disciplines include government departments, agencies, or statutory bodies; any financial institution or entity engaged in export financing in which there is governmental participation by way of equity, provision of loans or underwriting of losses; any governmental or non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which or by virtue of which they influence through their purchases or sales the level or direction of exports; and any bank or other private financial institution which acts on behalf of or at the direction of governments or their agencies.

3. Prohibition

Except to the extent provided under Article 10.4 under the Uruguay Round Agreement on Agriculture, Members shall be prohibited from using export credit, export credit guarantee and export credit insurance programs that do not meet the provisions of this article.

4. Notification

Within ninety days of the entry into force of this agreement, a Member shall notify any program that it maintained before the

entry into force of this agreement. A Member shall not maintain programs that were not so notified.

No later than the next semi-annual reporting date, a Member shall notify the terms and conditions of any new programs and any exclusive or special rights or privileges, including statutory or positional powers granted, implemented after the beginning of the implementation period of this agreement. Failure to notify shall result in the prohibition of use.

5. Transparency and Reporting

Members shall assure transparency in the use of export credit programs. Semi-annual reporting shall be as set out in Annex 1 of this Agreement.

6. Terms and Conditions

A Member shall not maintain export financing programs other than in accordance with the following provisions:

(a.) Repayment term

The maximum repayment term of 180 days shall begin at the starting point of export financing and end on the contractual date of the final payment.

(b.) Period of validity

Credit terms and conditions (e.g., interest rates for official financing support and all risk-based terms and conditions) offered for an individual export credit or line of credit shall not be fixed for a period exceeding six months without payment of the premium.

(c.) Starting point of export financing

The starting point of export financing shall not be later than the actual date of shipment of the goods to the recipient country.

(d.) Repayment of principal

The principal sum shall be repaid no later than 180 days after the starting point of export financing.

(e.) Repayment of interest

Interest shall be paid no later than 180 days after the starting point of export financing. In the case of official financing

support[1], interest excludes (i) any payment of premium or other charge for insuring or guaranteeing supplier credits or financial credits; (ii) any other payment of banking fees or commissions relating to the export credit; and (iii) any withholding taxes imposed by the importing country.

(f.) Minimum interest rate

Interest rates offered for official financing support shall not be below the actual costs of borrowing for the funds so employed (including costs of funds if capital was borrowed on international markets in order to obtain funds of the same maturity), plus a risk-based spread reflective of prevailing market conditions.

(g.) Premiums

Premiums charged under export financing programs shall be consistent with the following provisions: premiums shall be adequate to cover long-term operating costs and losses; premiums shall be expressed in percentages of the principal value of the credit; and premiums shall be paid in full at date of issuance and shall not be financed.

(h.) Coverage

Export financing shall cover less than the full value of a transaction.

(i.) Rebates Rebates in any form shall be explicitly prohibited.

(j.) Foreign exchange risk

Export credits, export credit guarantees, export credit insurance, and related financial support shall be provided in freely traded currencies. Foreign exchange exposure deriving from credit that is repayable in the currency of the importer shall be fully hedged, such that the market risk and credit risk of the transaction to the supplier/lender/guarantor is not increased. The cost of the hedge shall be incorporated into and be in addition to the premium rate determined according to Article 6 (g).

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[1] Official financing support includes direct credits/financing, refinancing and interest rate support (G/AG/NG/S/13).

7. Special and Differential Treatment:

Special and differential treatment in favor of recipient developing countries shall take the form of the following export credits terms and conditions:

(a.) The maximum repayment term of thirty months for developing countries shall begin at the starting point of export financing and end on the contractual date of the final payment.

(b.) The principal sum shall be repaid in equal and regular installment not less frequently than annually with the first payment due no later than twelve months after the starting point of credit.

(c.) Interest shall be paid not less frequently than annually, with the first payment to be made no later than twelve months after the starting point of export financing.

8. Emergency Exception

An emergency is defined as a sudden, significant, and unusual deterioration in a recipient country's economy, which may have far-reaching consequences such as social deprivation or unrest. In the event of an emergency the recipient country Member may request of the providing Member more generous terms for either export credits, export credit guarantees, or export credit insurance programs. The recipient Member shall notify the Committee on Agriculture in writing of any request for more generous terms. The providing Member shall consider all requests for more generous terms in accordance with the need to sustain the viability of their export credits, export credit guarantees, or export credit insurance programs.

(4) Transparency in WTO Dispute Settlement Proceedings

The Doha meeting in November 2001 specifically called for negotiations to clarify and improve the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. On August 9, 2002, the United States submitted its first proposal in those negotiations, to expand

transparency and public access to WTO dispute settlement proceedings. The proposal would open most substantive panel, appellate body, and arbitration meetings and would provide greater public access to briefs and panel reports. It also called on WTO members to consider rules establishing guidelines for how *amicus curiae* submissions are to be considered. The text of the proposal is provided below in full, and is available at *http://usinfo.state.gov/topical/econ/wto/dsu020809.htm*.

I. Introduction

The Uruguay Round of multilateral trade negotiations was able to achieve agreement on a wide range of new disciplines designed to reduce banters to trade while recognizing the legitimate needs of Members to pursue policy objectives. Those new disciplines reached areas of government action additional to those areas that had traditionally been the subject of trade disciplines. Members also agreed on a new dispute settlement system in order to help resolve problems arising from the application of these World Trade Organization ("WTO") disciplines.

Experience under the WTO dispute settlement system since 1995 has demonstrated that the recommendations and rulings of the Dispute Settlement Body [DSB] can affect large sectors of civil society. At the same time, increased membership in the WTO has also meant that more governments and their citizens have an interest in those recommendations and rulings. Yet civil society and Members not party to a dispute have been unable even to observe the arguments or proceedings that result in these recommendations and rulings.

Other international dispute settlement fora and tribunals are open to the public, such as the International Court of Justice (1), the International Tribunal for the Law of the Sea (2), the International Criminal Tribunal for the former Yugoslavia (3), the International Criminal Tribunal for Rwanda (4), the European Court of Human Rights (5), and the African Court on Human

and Peoples' Rights. (6) Those fora deal with issues that are intergovernmental in nature and are at least as sensitive as those involved in WTO disputes. For example, these fora have addressed boundary disputes, use of force, nuclear weapons, human rights violations, and genocide.

There is no reason why the WTO should be different in this respect. The public has a legitimate interest in the proceedings. WTO trade disputes, like other intergovernmental disputes, could benefit from being more transparent to the public. Indeed, implementation of the DSB recommendations and rulings may be facilitated if those being asked to assist in the task of implementation, such as the constituencies of legislators, have confidence that the recommendations and rulings are the result of a fair and adequate process.

At the same time, non-party WTO Members would benefit from being able to observe the arguments and proceedings of WTO disputes. (7) This would assist Members, including developing countries, in understanding the issues involved as well as gaining greater familiarity and experience with dispute settlement. Being better informed about disputes generally could aid Members in deciding whether to assert third party rights is a particular dispute.

A more open and transparent process would be a significant improvement to the DSU, in keeping with the commitment by Ministers "to promote a better public understanding of the WTO", and "to making the WTO's operations more transparent, including through mare effective and prompt dissemination of information. (8) Such a more open and transparent process could be achieved by providing an opportunity to observe the arguments and evidence submitted in proceedings as well as observing those proceedings, subject to appropriate safeguards such as for confidential information and security. In addition, the final results of those proceedings should be made available to the public as soon as possible. The following proposals are intended to help achieve, such a more open and transparent process. In no case are these proposals designed to afford Members fewer or more limited rights than those available to civil society.

II. Open Meetings

The DSU should provide that the public may observe all substantive panel, Appellate Body and arbitration (9) meetings with the parties except those pardons 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.

III. Timely Access to Submissions

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.

IV. Timely Access to Final Reports

The WTO should make a final panel report available to VITO Members and the public once it is issued to the parties, although only circulation would trigger the relevant DSU deadlines.

V. Amicus Curiae Submissions

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.

(1) Article 59, Rules of Court.

(2) Article 74, Rules of the Tribunal.

(3) Rule 78, Rules of Procedure and Evidence.

(4) Rule 78, Rules of Procedure and Evidence.

(5) Rule 33, Chapter I, Title II, Rules of Court.

(6) Article 10, on the Establishment of an African Court of Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights.

(7) We note that other Members have expressed an interest in this.

(8) Paragraph 10 of the Doha Ministerial Declaration.

(9) This would include arbitration under Articles 21.3(c), 22.6 and 25 of the DSU.

(5) U.S. moratorium on dispute settlement regarding medicines for HIV/AIDS and other health crises in absence of WTO consensus

On December 20, 2002, the U.S. Trade Representative ("USTR") announced an interim plan to help poor countries fight HIV/AIDS and other health crises in the absence of WTO consensus. In the November 2001 Doha trade negotiations, WTO ministers affirmed that global trade rules permit compulsory licensing of drugs for domestic health emergencies such as HIV/AIDS, malaria, tuberculosis, and other types of infectious epidemics. Subsequent negotiations in the WTO had failed to find consensus on a new multilateral rule to enable poor countries without domestic production capacity to import from third countries under compulsory license the drugs needed for such domestic health emergencies. While stating that it continued to work with other WTO members toward a solution within the WTO, the United States announced its own interim plan, as described in excerpts from the USTR press release set forth below. U.S. Trade Representative Robert B. Zoellick urged other countries "to join us in this moratorium to help poor countries get access to emergency life-saving drugs."

The full text of the press release is available at *www.ustr.gov/releases/2002/12/02-119.htm.*

The United States today announced an immediate practical solution to allow African and other developing countries to gain greater access to pharmaceuticals and HIV/AIDS test kits when facing public health crises. The U.S. pledged to permit these countries to override patents on drugs produced outside their countries in order to fight HIV/AIDS, malaria, tuberculosis, and other types of infectious epidemics, including those that may arise in the future.

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The United States will continue to work with other WTO Members to try to find a solution within the WTO. In the meantime, the United States will implement the Doha Declaration by pledging not to challenge any WTO Member that breaks WTO rules to export drugs produced under compulsory license to a country in need, and called on others to join the United States in this moratorium on dispute settlement.

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Interim Measure by the United States Government:
At Doha, Ministers affirmed their commitment to the TRIPS Agreement and confirmed Members' ability to use the flexibility in the Agreement, including the ability to override patents, to address public health crises.

However, many least-developed countries, for example in Africa, and some developing countries, lack sufficient manufacturing capacity in the pharmaceutical sector to make effective use of compulsory licensing as currently provided by the TRIPS Agreement. The interim solution that the United States is announcing today is designed to help those countries combat HIV/AIDS, malaria, tuberculosis, and other infectious epidemics of comparable gravity and scale, including those that may arise in the future, by enabling them to treat these diseases by importing drugs from other WTO Members under the compulsory licensing

rules of the TRIPS Agreement. Such infectious diseases would include, for example, ebola, African trypanosomiasis, cholera, dengue, typhoid, and typhus fevers.

The United States expects that all countries will cooperate to ensure that the drugs produced are not diverted from countries in need to wealthier markets.

The United States remains committed to finding a workable, transparent, sustainable, and legally certain solution that will fulfill the Doha Declaration directive as soon as possible. We encourage all countries to reflect on the original purpose of the Doha Declaration and to work for a solution that is consistent with it.

This special measure will not apply to developed country Members of the WTO or those developing economy Members classified by the World Bank as high income countries—Barbados, Brunei, Cyprus, Hong Kong, Israel, Kuwait, Liechtenstein, Macao, Malta, Qatar, Singapore, Slovenia, Taiwan, and the United Arab Emirates. These countries have sufficient production capacity in the pharmaceutical sector or sufficient financial resources to address such public health problems and thus do not need to import under compulsory licenses.

After a year of intensive negotiations, WTO Members have not been able to reach a consensus to implement the remaining elements of the Doha Declaration on the TRIPS Agreement and Public Health because some countries insisted that the solution cover all health problems, including non-emergencies. Further, some Members have insisted that the limited exception be available to all countries regardless of their manufacturing capacities or financial resources. This element of the Doha Declaration was intended to focus international action on the grave public health crises afflicting the poor and to assist countries lacking capacity and resources to obtain access to needed medicines for infectious epidemics. Unless WTO Members focus on infectious epidemics and truly needy countries, the solution called for at Doha will not benefit those for which it was intended.

Background:

Several U.S. pharmaceutical companies have formed partnerships with African countries and are working together to address many

of the problems related to providing treatment to those in need. Their policies include the sale of critical medicines at very low prices, as well as the building of an improved infrastructure for getting these medicines to those in need. More than 50 percent of all new medicines are invented in the United States. Therefore, we recognize that the solution both to today's health problems—and tomorrow's—in terms of new medicines, will likely come from U.S. companies.

At the Doha Ministerial, Ministers acknowledged the serious public health crises afflicting Africa and other developing and least-developed countries, especially those resulting from HIV/AIDS, malaria, tuberculosis and other infectious epidemics. Ministers agreed on the need for a balance between the needs of poor countries without the resources to pay for cutting edge pharmaceuticals and the need to ensure that the patent rights system which provides the incentives for continued development and creation of new lifesaving drugs is promoted. One major part of the Doha Declaration was agreement to provide an additional ten-year transition period (until 2016) for least developed countries, as proposed by the United States and agreed upon by all WTO Members.

Paragraph 6 of the Doha Ministerial Declaration on the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement and Public Health recognizes that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement in order to address these health problems. WTO Ministers directed the TRIPS Council to find a solution to this problem and to report to the General Council before the end of 2002.

Under current WTO patent rules, a country is free to override a patent, under certain conditions, to allow production of the patented product in its domestic market. This is commonly referred to as "compulsory licensing." The Doha Declaration affirmed that Members may use compulsory licensing to address public health crises. However, under current WTO rules, products produced under compulsory license generally cannot be exported to other WTO Members. The U.S. solution is intended to eliminate this export restriction so medicine can be supplied to countries most in need that cannot manufacture their own pharmaceuticals.

E. OTHER TRADE AGREEMENTS AND RELATED ISSUES

1. Trade Promotion Authority

a. Legislation enacted

On August 6, 2002, President George W. Bush signed into law the Trade Act of 2002. Title XXI of the act, entitled Bipartisan Trade Promotion Authority Act of 2002, established objectives, policies, and priorities for trade agreements that would be reviewed by Congress on an expedited basis, known as trade promotion authority. Pub L. No. 107–210, 116 Stat. 933. Section 2102 of the act established trade negotiating objectives, including principal negotiating objectives in the following areas: reduction or elimination of trade barriers and distortions, trade in services, foreign investment, intellectual property, transparency, anti-corruption, improvement of the WTO and multilateral trade agreements, regulatory practices, electronic commerce, and reciprocal trade in agriculture. Section 2103 authorizes the President to enter into trade agreements regarding reduction or elimination of tariff and nontariff barriers with foreign countries under certain conditions before June 1, 2005, with a possible extension through June 1, 2007. Such agreements would be considered under expedited procedures established under section 151 of the Trade Act of 1974, 19 U.S.C. § 2192 (2003). Section 2104 establishes consultation and assessment requirements, including a requirement that the President provide written notice to Congress at least 90 calendar days before initiating negotiations setting forth the date negotiations will be initiated and the specific U.S. objectives; and consult with Congressional committees and a congressional oversight group established pursuant to § 2107 regarding the negotiations. Additional requirements are established for negotiations regarding agriculture, fish and shellfish, and textiles. Under § 2105, the President must notify Congress 90 calendar days before the day on which the President enters into a trade agreement under this authority, must submit to Congress within 60 days after entering into the agreement a description

of needed changes to existing laws to comply with the agreement, and must provide a copy of the final legal text and supporting documents after entering into the agreement. Excerpts below from the President's remarks in signing the law provide his views on its significance.

The full text of the signing statement is available at *http://www.whitehouse.gov/news/releases/2002/08/20020806-4.html*.

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With trade promotion authority, the trade agreements I negotiate will have an up-or-down vote in Congress, giving other countries the confidence to negotiate with us. Five Presidents before me had this advantage, but since the authority elapsed in 1994, other nations and regions have pursued new trade agreements while America's trade policy was stuck in park. With each passing day, America has lost trading opportunities and the jobs and earnings that go with them. Starting now, America is back at the bargaining table in full force.

I will use trade promotion authority aggressively to create more good jobs for American workers, more exports for American farmers, and higher living standards for American families. Free trade has a proven track record for spurring growth and advancing opportunity for our working families. Exports accounted for roughly one-quarter of all U.S. economic growth in the 1990s. Jobs in exporting plants pay wages that are up to 18 percent higher than jobs in nonexporting plants. And our two major trade agreements, NAFTA and the Uruguay Round, have created more choices and lower prices for consumers while raising standards of living for the typical American family of four by $2,000 a year.

America will build on this record of success. A completely free global market for agricultural products, for example, would result in gains of as much as $13 billion a year for American farmers and consumers. Lowering global trade barriers on all products and services by even one-third could boost the U.S. economy by $177 billion a year and raise living standards for the average family by $2,500 annually. In other words, trade is good for the

American people, and I'm going to use the trade promotion authority to bring these benefits to the American people.

Free trade is also a proven strategy for building global prosperity and adding to the momentum of political freedom. Trade is an engine of economic growth. It uses the power of markets to meet the needs of the poor. In our lifetime, trade has helped lift millions of people and whole nations and entire regions out of poverty and put them on the path to prosperity. History shows that as nations become more prosperous, their citizens will demand and then can—and can afford a cleaner environment. And greater freedom for commerce across the borders eventually leads to greater freedom for citizens within the borders.

The members of the diplomatic corps with us today understand the importance of free trade to their nations' success. They understand that trade is an enemy of poverty and a friend of liberty. I want to thank the ambassadors for their role in getting this bill passed, especially the Andean ambassadors, who are such strong advocates for the Andean Trade Preference Act. By providing trade preference for products from four Andean democracies, we will build prosperity, reduce poverty, strengthen democracy, and fight illegal drugs with expanding economic opportunity.

Trade promotion authority gives the United States an important tool to break down trade barriers with all countries. We'll move quickly to build free trade relationships with individual nations, such as Chile and Singapore and Morocco. We'll explore free trade relationships with others, such as Australia. The United States will negotiate a Free Trade Area of the Americas and pursue regional agreements with the nations of Central America and the Southern African Customs Union. We'll move forward globally, working with all nations to make the negotiations begun last year in Doha a success. A little more than a week ago, the United States put forward a far-reaching proposal to lower worldwide agricultural trade barriers. These innovative set of ideas can lead to real progress in this challenging area.

Trade gives all nations the hope of sharing in the great economic and social and political progress of our age. And trade will give American workers the hope that comes from better and higher

paying jobs. America's committed to building a world that trades in freedom and grows in prosperity and liberty. Today we have the tools to pursue that vision, and I look forward to the work ahead.

b. Agreements to be negotiated

During 2002, Robert B. Zoellick, U.S. Trade Representative, notified Congress of the President's intention to initiate negotiations for FTAs with Morocco (October 1), Central America (October 1), the South African Customs Union (Botswana, Lesotho, Namibia, South Africa and Swaziland) (November 4), and Australia (November 13).

Excerpts from Mr. Zoellick's letter of October 1, 2002, to Senator Robert C. Byrd, President Pro Tempore, U.S. Senate, concerning negotiation of an agreement with Morocco, are set forth below.

The full texts of all letters notifying Congress are available by month at *www.ustr.gov/releases/2002*.

At the direction of the President, I am pleased to notify the Congress that the President intends to initiate negotiations for a free trade agreement (FTA) with Morocco 90 days from the date of this letter. This notification is in accordance with section 2104(a)(1) of the Trade Act of 2002. It is crucial that we move forward on this and other trade agreements in order to restore America's leadership on trade.

The Administration is committed to bringing back trade agreements that open markets to benefit our farmers, workers, businesses, and families. With the Congress' continued help, we can move promptly to advance America's trade interests.

In my letter of August 22, 2002, to the Congressional leadership and trade committees, I outlined the reasons that it is in the United States' interest to pursue a free trade agreement with Morocco.

An FTA will create improved commercial and market opportunities for U.S. exports to Morocco and to North and West Africa. It will foster economic growth, increase living standards,

and create higher paying jobs in the United States and Morocco by reducing and eliminating bilateral barriers to trade, while reinforcing important American values in the region. This FTA will also further strengthen our relations with a country that was one of the first to condemn the September 11 terrorist attacks and has stood by our side ever since.

Trade liberalization with Morocco will support this Administration's commitment to promote more tolerant, open, and prosperous Muslim societies. A U.S.-Morocco FTA will support the significant economic and political reforms underway in Morocco, enhance the Moroccan government's efforts to attract new trade and investment, and promote sustainable development.

Such increased trade and investment can help create better jobs for Morocco's citizens. For both Morocco and the United States, implementation of the agreement of course will be critical to realizing its benefits. The Administration therefore intends to target ongoing development assistance and trade-related technical assistance to help Morocco follow through on the commitments it will make as part of the FTA.

Initial consultations with Members of Congress regarding an FTA with Morocco have been positive, and we believe that there is broad bipartisan interest in such an agreement. The Administration will continue to consult closely with the Congress, including the new Congressional Oversight Group.

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c. Agreements to be concluded

The United States reached agreement on the text of a free trade agreement with Singapore on November 19, and with Chile on December 11, 2002. A summary of the agreement with Chile is available at *www.ustr.gov/releases/2002/12/02-114.htm.* Under the Trade Act of 2002, the executive branch must notify Congress at least 90 days before signing the agreement. Notification of these two FTAs was expected to occur in January 2003.

d. Negotiation in progress: Free Trade Area of the Americas

On November 1, 2002, the trade ministers of the 34 democracies in the Western Hemisphere held their Seventh Ministerial meeting in Quito, Ecuador, to review progress in negotiations to establish a Free Trade Area of the Americas ("FTAA"). The aim of the negotiations is to complete the FTAA by January 1, 2005, a deadline established at the Third Summit of the Americas, held in Quebec City in April 2001. A fact sheet issued by the Office of the U.S. Trade Representative before the meeting summarized the goals and status of the FTAA as follows:

> Why FTAA? With more than 800 million people throughout the Western Hemisphere, the FTAA will be the largest free-trade area in the world. In the 1990s, U.S. exports to Latin America grew faster than exports to any other region, but U.S. businesses, workers, farmers and ranchers still face many market access barriers in the region, such as import taxes that are often five times higher than U.S. import taxes.
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> Current Status. On May 15, 2002, negotiators began work on market access commitments in agriculture, industrial goods, services, investment and government procurement. Negotiations and discussions are also proceeding in intellectual property; subsidies, dumping and countervailing duties; competition policy and dispute settlement. Discussions on ecommerce, smaller economies, and interaction with civil society are also taking place. The talks are about to enter a key phase of specific, concrete bargaining. For market access negotiations, countries will table their initial "offers" between December 15, 2002 and February 15, 2003, with requests for improvements to these offers due before June 15, 2003. Final revised offers are due by July 15, 2003.

At the November 1 meeting, the United States and Brazil assumed co-chairmanship of the FTAA.

The full text of the fact sheet and other information concerning the meetings is available at *www.ustr.gov/new/ftaa-quito.htm*. The Ministerial Declaration of Quito is available at *www.ftaa-alca.org/ministerials/quito/minist_e.asp*.

2. U.S.-Cambodia Textile Agreement

On January 7, 2002, the office of the United States Trade Representative announced that agreement had been reached to extend the U.S.-Cambodia Bilateral Textile Agreement for an additional three years, through December 31, 2004. The action was cited by U.S. Trade Representtive Robert B. Zoellick as "an excellent example of the way trade agreements lead to economic growth and promote a greater respect for workers' rights." Excerpts from the USTR press release are provided below.

The full text of the press release is available at *www.ustr.gov/releases/2002/01/02-03.htm*

The Memorandum of Understanding increases Cambodia's quota for textile imports by nine percent, in addition to a six percent increase that is normal for most textile import quotas—a total increase of 15 percent. The nine percent increase for 2002 reflects Cambodia's progress towards ensuring that working conditions in its garment sector are in "substantial compliance" with internationally recognized labor standards and provisions of Cambodia's labor law, and follows recent formal U.S.-Cambodian labor consultations. The International Labor Organization (ILO) also has two projects underway assisting Cambodia with the implementation of its labor law.

As in the original agreement, Cambodia will be eligible for future additional quota increases if working conditions in the garment industry substantially comply with internationally recognized core labor standards. The U.S. and Cambodian governments agreed to increase this potential quota reward for full compliance from 14 to 18 percent. The United States and Cambodia will keep working conditions in the Cambodian garment sector under

ongoing review, and will conduct two rounds of labor consultations in 2002, as provided for in the Agreement. Should it be determined that Cambodia has made further, substantial progress towards achieving this benchmark of "substantial compliance," the 2002 annual quota bonus level could be increased further.

In the first ten months of 2001, total U.S. imports from Cambodia were $826.7 million, of which $818.2 million were textiles and apparel. During the same period, U.S. companies increased textile and apparel exports to Cambodia by 225 percent; exports were valued at $652,000.

F. OTHER ISSUES

1. Export-Import Bank Reauthorization Act of 2002

On June 14, 2002, President George W. Bush signed into law the Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107–189, 116 Stat. 698, "to ensure the continued effective operation of the Export-Import Bank, which will advance U.S. trade policy, facilitate the sale of U.S. goods and services abroad, and create jobs at home." In so doing, however, he made comments concerning interpretation of certain provisions of the act as provided in the excerpt below.

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The executive branch shall carry out section 7(b) of the bill, which relates to certain small businesses, in a manner consistent with the requirements of equal protection under the Due Process Clause of the Fifth Amendment to the Constitution.

Subsections 10(a) and 10(b)(2) of the bill purport to require the Secretary of the Treasury to negotiate with foreign countries and international organizations to achieve particular purposes and to require the Secretary to submit a report to congressional committees on the contents of negotiations and certain related executive deliberations. These provisions interfere with the President's constitutional authority to conduct the Nation's foreign

affairs, supervise the unitary executive branch, and 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. Accordingly, the executive branch shall construe these provisions as precatory rather than mandatory.

The executive branch shall construe the reference to the "Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948," added to section 2(b)(1)(B) of the Export-Import Bank Act by section 15 of the bill, as only providing examples of types of human rights that the President may wish to consider in making a determination under section 2(b)(1)(B) and not as giving the Universal Declaration the force of U.S. law. www.whitehouse.gov/news/releases/2002/06/2002.0614.html.

2. OECD Guidelines for Multinational Enterprises

In May 2002, the Bureau of Economic and Business Affairs, U.S. Department of State, established a national contact point and made available an information booklet on the Organization for Economic Cooperation and Development ("OECD") Guidelines for Multinational Enterprises. The OECD guidelines are non-binding recommendations for appropriate corporate behavior made to multinational enterprises by the 30 OECD member countries and six non-member countries. As a member of the OECD adhering to the guidelines, the United States agreed to establish a national contact point. As described in the booklet, the role of the national contact point ("NCP") is "to promote the Guidelines, handle inquiries, and discuss with concerned parties matters covered by the Guidelines. The Guidelines also provide for NCPs to cooperate with each other where appropriate, to meet annually to share experiences, and to report on their activities."

The booklet provides a summary of the guidelines and contains excerpts from a statement by Alan P. Larson, Under

Secretary of State for Economic, Business, and Agricultural Affairs, at the OECD Ministerial Conference on 27 June 2000, set forth below.

The full text of the booklet is available at *www.state.gov/e/eb/oecd/book/10215.htm*.

Globalization and foreign direct investment are powerful forces for good and can raise living standards by spreading the benefits of increased economic opportunity throughout the world. Promoting broad standards of appropriate corporate behavior will enhance the investment climate. For societies to benefit fully from this improved investment climate, we need to raise standards in important areas of social concern. OECD and U.S. companies are world leaders in good corporate citizenship and take their commitment to high standards with them around the world in their everyday operations. The adoption of these Guidelines will help ensure that others match our standards and will promote a form of globalization that not only generates wealth, but also raises standards on social, labor, environmental, and human rights issues.

We are committed to the effective use of the Guidelines. The United States will not shrink from our responsibility to continue to encourage the observance of high standards of conduct where it is lacking. Nor will we allow these Guidelines to become a vehicle for unfairly tarnishing the reputation of good corporate citizens.

If all OECD Members, as well as other countries which we encourage to adhere to the Declaration, share our commitment, I am confident the OECD Guidelines will become a global benchmark for corporate responsibility and continue to reinforce high standards of corporate behavior. Our adoption today of the revised Guidelines demonstrates how globalization can work for the betterment of societies around the world. It represents an important step in the governance of the global economy.

3. Rough Diamonds: Kimberley Process Certification Scheme

On November 5, 2002, the United States joined 47 other governments participating in the Kimberley Process in

Interlaken, Switzerland, in agreeing to eliminate conflict diamonds from international trade beginning January 1, 2003. Excerpts from a press release issued by the State Department of the same date described the U.S. view.

The press release is available at *www.state.gov/r/pa/prs/ps/2002/14913.htm*. The Inerlaken Ministerial Declaration is available at *www.kimberleyprocess.com/BulletinDisplay.asp?*

The Interlaken Declaration is the culmination of two years of intensive coordination and cooperation among governments in a global coalition, including the diamond industry and civil society, to cut off the use of diamonds to finance rebel movements which have destabilized governments and terrorized people in Africa. These negotiations led to creation of a global rough diamond certification system, which has been endorsed by the United National General Assembly.

The United States has worked intensively over the past two years to combat the conflict diamonds trade. The creation of this trading system fulfills an international commitment to the innocent victims of conflicts that have been fueled by the proceeds of conflict diamond transactions. The Kimberley Process will help curb the financing of rebel movements in the future and curtail their ability to threaten civilians. It enables governments to use their diamond resources to finance economic and social development, to the benefit of their people. And it protects the legitimate diamond industry, which is responsible for the vast majority of rough diamonds traded worldwide.

Cross Reference

Enforcement of foreign tax claim in the United States, **Chapter 15.A.4.**

Chapter 12

Territorial Regimes and Related Issues

A. LAW OF THE SEA AND RELATED ISSUES

1. United Nations Convention on Law of the Sea

On January 7, 2002, Secretary of State Colin L. Powell responded to a letter from UN Secretary-General Koffi Annan concerning the importance of the United States becoming a party to the UN Convention on the Law of the Sea, with Annexes, done at Montego Bay, December 10, 1982, 1933 U.N.T.S. 397 (1982), 21 I.L.M. 1261 (1982) ("UNCLOS"). Secretary Powell's letter is set forth in full below.

Thank you for your letter calling attention to the importance of universal participation in the United Nations Convention on the Law of the Sea. As you note, the Convention has brought certainty and stability to the law governing the oceans and has contributed to international peace and security, especially through freedom of navigation.

We are aware of the elections scheduled for April 2002 for the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf. The United States would indeed benefit from representation on these bodies, where we could influence the delimitation of continental shelves throughout the world—an issue of keen interest to our oil and gas industry—and help to steer the future development of the rule

of law under the Convention. Also of importance would be the opportunity for the United States to exercise leadership in other aspects of the Convention to ensure freedom of the seas and ocean uses consistent with sound commercial principles, as we did during negotiation of the Convention and the 1994 agreement amending Part XI.

The United States Senate plays a critical role in the decision to accede to a treaty, and President Bush's Administration is exploring with the Senate the United States' accession to the Convention.

Thank you for the copy of the compendium recently issued by the International Seabed Authority. This collection of documents related to the Convention will be very useful to many of us here at the State Department. We appreciate the efforts of Secretary-General Satya Nandan in preparing this helpful volume.

2. Outer Limits of Extended Continental Shelf

On December 21, 2001, the Russian Federation became the first country to make a submission to the Commission on the Limits of the Continental Shelf pursuant to article 76, paragraph 8, of UNCLOS. As described in a press release by the Commission:

> The submission contains data and information on the proposed outer limits of the continental shelf of the Russian Federation beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (often referred to as an extended continental shelf).
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> * * * *
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> In accordance with rule 49 of the Rules of Procedure of the Commission (CLCS/3/Rev.3 and Corr. 1), which requires that the proposed outer limits of the extended continental shelf pursuant to the submission be made public, a *note verbale* was circulated to all Member States of the United Nations, including the States Parties to the Convention. The *note verbale* contains the information

> regarding the outer limits of the Russian continental shelf in the Arctic and Pacific Oceans. It includes geographical coordinates of points delineating the proposed outer limits, as well as illustrative maps. . . .

Press Release SEA/1729, available at *www.un.org/News/Press/docs/2001/sea1729.doc.htm*.

In response, Canada, Denmark, Japan, Norway, and the United States filed comments on the Russian Federation submission. In its comments, dated February 28, 2002, the United States indicated that it believed that the submission had major flaws as related to the continental shelf claim in the Arctic. The cover letter stressed that "the integrity of the Convention and the process for establishing the outer limit of the continental shelf beyond 200 nautical miles ultimately depends on adherence to legal criteria and whether the geological criteria and interpretations applied are accepted as valid by the weight of informed scientific opinion." Excerpts below from the U.S. submission of February 28 provide its analysis of key elements of the Russian submission.

The full text of the U.S. submission is available at *www.un.org/Depts/los/clcs_new/submissions_files/CLCS_01_2001_LOS__USAtext.pdf.*

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BASELINES

The Government of the United States of America is of the view that, while the Commission has no competence over questions of baselines from which the breadth of the territorial sea is measured, it should not bbe perceived as endorsing particular baselines. In any event, the Commission should ensure that it does not, on a global basis, endorse baselines, whether or not they may be inconsistent with international law. It might, for example, indicate in all recommendations regarding all submissions, that it is not taking a position regarding baselines.

MARITIME BOUNDARIES

The Government of the United States of America wishes to note that the Russian submission utilizes the boundary embodied in the Maritime Boundary Agreement between the United States of America and the Union of the Soviet Socialist Republics (signed on June 1, 1990), notwithstanding the fact that the Russian Duma has not yet approved the treaty. The use of that boundary is consistent with the mutual interests of Russia and the United States in stability of expectations, and with Article 9 of Annex II of the Convention, which provides that the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.

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RIDGES

Paragraph 3 of Article 76 states: "The continental margin comprises the submerged prolongation of the land mass of the coastal State. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."

ALPHA-MENDELEEV RIDGE

Mounting geologic and geophysical evidence indicates the Alpha-Mendeleev Ridge System is the surface expression of a single continuous geologic feature that formed on oceanic crust of the Arctic Ocean basin by volcanism over a "hot spot." (A "hot spot" is a magma source rooted in the Earth's mantle that is persistent for at least a few tens of millions of years and intermittently produces volcanoes on the overlying earth's crust as it drifts across the hot spot during continental drift.) The Alpha-Mendeleev hot spot was formed by magma that was funneled from a hot spot to the spreading axis that created the Amerasia Basin of the Arctic Ocean 130 to 120 million years ago, and built a volcanic ridge about 35 km thick on the newly formed oceanic crust. Both aeromagnetic and bathymetric data show that the ridge extends entirely across the Arctic Ocean, and that its characteristic

aeromagnetic expression ends at the continental margins at both ends and is absent from the adjacent continental shelves. The Alpha-Mendeleev Ridge is identical in origin to the Iceland-Faroe Ridge, an oceanic ridge of volcanic origin of similar thickness and morphology that is now forming from magma funneled from a hot spot to the actively spreading Mid-Atlantic Ridge. The Alpha-Mendeleev Ridge System is therefore a volcanic feature of oceanic origin that was formed on, and occurs only within the area of, the oceanic crust that underlies the Arnerasia Subbasin of the deep Arctic Ocean Basin. It is not part of any State's continental shelf. Sonic specific supporting data are:

— The sea floor of the Alpha-Mendeleev Ridge is bathymetrically rough and the overall (average) slope of its flanks is low to moderate. In these characteristics it resembles the morphology of the oceanic lceland-Faroe Ridge and differs markedly from the morphology of ridges in the ocean that are composed of continental rock, which have flat or gently convex crests and steep slopes.
— Modern aeromagnetic data, which cover essentially all of the Arctic Ocean, show that the Alpha-Mendeleev Ridge System is the bathymetric expression of a single, extensive field of magnetic anomalies of distinctive character that lies within the confines of the deep water, oceanic part of the Arctic Ocean Basin. This anomaly field, which is characterized by geometrically irregular short wavelength, high amplitude anomalies, does not cross the Russian continental margin and is absent from the adjacent broad continental shelf of the East Siberian Sea. It is similar in magnetic character to the magnetic anomaly field generated by the oceanic lceland-Faroe Ridge. The Alpha-Mendeleev Ridge System is not, therefore, a submerged prolongation of the land mass of Russia.

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LOMONOSOV RIDGE

Lomonosov Ridge raises questions relating to natural prolongation. The ridge is a freestanding feature in the deep, oceanic part of the

Arctic Ocean Basin, and not a natural component of the continental margins of either Russia or any other State.

"SUBMARINE RIDGES"

The issue of ridges is complicated by the provision of Article 76, paragraph 6, which speaks of "submarine ridges." In that regard, the Government of the United States of America understands that the first sentence of that paragraph was not used by Russia in establishing the outer limit of the continental shelf beyond 200 nautical miles. Furthermore, that provision could not be so applied.

U.S. CONCLUSIONS AND RECOMMENDATIONS

The integrity of the Convention and the process for establishing the outer limit of the continental shelf beyond 200 nautical miles ultimately depends on adherence to legal criteria and whether the geologic criteria and interrelations applied are accepted as valid by the weight of informed scientific opinion. A broad scientific consensus of the relevant experts, not confined to the Commission, is critical to the credibility of the Commission and the Convention. The recommendations of the Commission must be based on a high degree of confidence that they will withstand the test of time. If the Commission is unsure, it should not make a recommendation but should announce that it needs further data, analysis and debate. If a State has doubts, it should perhaps make a partial submission, leaving further amplification to a later submission.

In the aforementioned scientific respects there are substantial differences between the Russian submission on the one hand and others in the relevant scientific community on the other hand, regarding key aspects of the proposed submission, based on reports in the open, peer-reviewed scientific literature. The Government of the United States of America proposes further consideration and broad debate before any recommendation is made by the Commission.

It will also be important that the Commission acts on procedural matters in a manner that enhances its integrity and

public appearance. In the absence of a code of ethics, which we believe should be developed by the Commission, the Commissioners should ensure that there are no conflicts of interest or the appearance thereof.

The Russian submission is particularly complex and should be considered in a deliberate manner. A significant period of debate and reflection will be required for the Convention to be carefully applied in a manner to promote stability. Insofar as no applications to explore or exploit the Area have been made or are likely to be made in the Arctic for the foreseeable future, no prejudice is likely to result from a deliberative process.

At its eleventh session, held in New York, June 24–28, 2002, the Commission adopted recommendations prepared by a subcommission established for the purpose of reviewing the Russian submission. The recommendations were provided to the Russian Federation in the context of further consideration of its submission. A short summary of the recommendations was included in the Report of the Secretary-General to the fifty-seventh session of the UN General Assembly, October 8, 2002, "Oceans and the Law of the Sea." A/57/57/Add.1, available at *http://ods-dds-ny.un.org/doc UNDOC/GEN/N02/629/28/PDF/N0262928.pdf?OpenElement.*

3. Rights and Freedoms of International Community in Navigation

On January 4, 2002, the United States provided information to the Government of Mauritius concerning a U.S. military aircraft that fell near Chagos Bay, Diego Garcia. The Government of Mauritius had raised questions about the possible risks to Mauritian fishermen from possible unexploded ordnance or other materials aboard the aircraft. The U.S. response, provided in a telegram of January 3, 2002, to the American embassy in Port Louis, is excerpted below.

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The Department has been informed that the aircraft is located in the area between 6–21.3 S 06–31.3 S and 072–18.4 E 072–28.5 E. It is the USG's view that the aircraft is located on the high seas. The wreckage and unexploded ordnance may create a hazard to navigation; therefore all mariners are advised to stay well clear of the area. The aircraft, and all articles and equipment associated with it, remain the sovereign property of the United States and should not be disturbed or removed without the express permission of the U.S. Government. If any wreckage associated with the aircraft is found, it should be immediately turned over to the nearest U.S. Government representative. The Untied States has issued HYROPAC 2062/01 (61) (NIMA NAVSAFETY Bethesda, MD 181445Z Dec 01) providing general warnings and similar information concerning the matter.

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4. Litigation Concerning Submerged lands off the Coast of Alaska

On July 24, 2002, the United States filed motions for partial summary judgment on three of four counts of a suit brought by the state of Alaska to quiet title to certain marine submerged lands. Alaska brought the case as an original action in the U.S. Supreme Court. *State of Alaska v. United States of America*, No. 128, Original. In its amended complaint, Alaska argued in count I that disputed submerged lands in the vicinity of the Alexander Archipelago were historic inland, i.e., internal, waters within the meaning of the Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1606, 516 U.N.T.S. 205 (1964) ("the Convention"). In count II, in the alternative, Alaska argued that the disputed lands were encompassed within one or more juridical bays, as defined by the Convention. The United States also filed a motion for partial summary judgment in count IV, seeking an order ruling that the United States reserved the marine submerged lands within Glacier Bay National Monument at the time of Alaska's admission to

the Union. Counts I and II, which involve international law issues, are discussed further below. Internal references to other pleadings and supporting documents as well as footnotes have been deleted.

The full texts of the briefs on counts I, II and IV are available at *www.state.gov/s/l/c8183.htm*.

a. Historical waters

The United States moved in count I for an order ruling that the waters of the Alexander Archipelago are not historic inland waters, and decreeing that Alaska did not possess title to the associated submerged lands that it claimed on that basis. In the view of the United States the waters at issue are territorial sea. The United States noted that resolution of the dispute would have two major consequences, one domestic and one international. Domestically, if the waters at issue were inland, then title to the seabed beneath them, unless reserved by the United States, was transferred to Alaska at statehood under the equal footing doctrine. On the international front, if the waters at issue were inland, they would be totally subject to the United States' sovereignty and dominion. If, on the other hand, they were part of the territorial sea, then, pursuant to the Convention, they would be subject to the international right of innocent passage.

Excerpts below from the brief filed by the United States on count I explain the interests of the United States in maintaining its position that the area in question constitutes territorial waters and the legal basis for doing so under both international and U.S. law.

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The United States has compelling reasons for objecting to Alaska's historic waters claims. As an initial matter, Alaska's theory would dispossess the United States of lands that are held by the United States under the Outer Continental Shelf Lands Act (OCSLA),

43 U.S.C. 1331 *et seq.*, for the benefit of all the American people. The United States determined, more than 30 years ago, through its Law of the Sea Committee on the Delineation of the Coastline of the United States (the Coastline Committee) that those lands are not located within inland waters. *See* 3 Reed, *Shore and Sea Boundaries*, 359–361, 415–418 (2000). If Alaska's claims are accepted, the United States would irretrievably be dispossessed of approximately 777 square statute miles of submerged lands that are held for the benefit of all of its citizens. The issues here, however, transcend that acreage, which appears to have limited economic value. The international precedent of this case has important consequences for the United States' foreign relations and national defense.

As a maritime nation and naval power, the United States has consistently championed a policy of freedom of the seas. *See*, *e.g.*, Roach & Smith, *United States Responses to Excessive Maritime Claims* 3–6 (1996); Swartztrauber, *The Three Mile Limit of Territorial Seas* 252 (1982); Bouchez, *The Regime of Bays in International Law* 84 (1964); *Hearings on Submerged Lands before the Sen. Committee on Interior and Insular Affairs*, 83rd Cong., 27–28 (1953). That policy is "essential to [the United States'] maritime commerce and national security." Roach, *supra*, at 3. As the Department of the Navy explained to Congress more than 50 years ago: The time-honored position of the Navy is that the greater the freedom and range of its warships and aircraft, the better protected are the security interests of the United States because greater utilization can be made of warships and military aircraft. H. Rep. No. 82–2515, at 18 (1952). Given the United States' "dependence on the sea to preserve legitimate security and commercial ties, the freedom of the seas will remain a vital interest. . . . Recent events in the Gulf, Liberia, Somalia, and elsewhere show that American seapower, without arbitrary limits on its . . . operations, makes a strong contribution to global stability and mutual security." Roach, *supra*, at 3 n. 3 (quoting National Security Strategy of the United States (Aug. 1991)).

In order to protect national security, and as a matter of demonstrating its own self-restraint in conformity with that interest, the United States has both restricted its inland water claims and

resisted the extravagant claims of others. It has regularly advocated, through diplomatic channels and in international fora, that foreign nations likewise define their own inland waters narrowly to preserve the right of innocent passage through coastal waters and that they join the United States in resisting such claims by other nations. Roach, *supra*, at 3–4. Indeed, the United States has been at the forefront in actively and forcefully opposing extravagant foreign claims of maritime sovereignty. For example, since 1948 the United States has filed more than 140 diplomatic notes opposing excessive foreign maritime claims. Roach, *supra*, at 7. *See*, *e.g.*, *id.* at 15–28, 31–34, 77–81, 161, 172, 186–192, 203–208, 214–222, 236–251, 266–267, 296–359 (describing diplomatic actions). The United States has further reinforced its diplomatic stance through military action. Beginning in 1979, the United States initiated its Freedom of Navigation Program "to further the recognition of the vital national need to protect maritime rights throughout the world." *Id.* at 5. That program includes "[o]perations by U.S. naval and air forces designed to emphasize internationally recognized navigational rights and freedoms." *Id.* at 10. Those forces "have exercised their rights and freedoms in all oceans against objectionable claims of more than 35 countries at the rate of some 30–40 per year." *Id.* at 11. *See*, *e.g.*, *id.* at 49–52 and 242–251 (Russia), 141–142 (Libya), and 339–353 (Canada).

As part of its international policy, to set a conservative example and avoid precedents which might be cited in support of foreign claims, the United States has limited this Nation's inland water claims. The United States must therefore voice strong objections when a State of the Union urges the Supreme Court to adopt historic inland waters principles that are inconsistent with that important and established foreign policy. The legal theory that Alaska puts forward in Count I is inconsistent with governing legal principles and the positions that the United States puts forward in the international arena. Although historic waters claims often entail a fact-intensive inquiry, in this case, Alaska's legal theory is plainly inadequate to support judgment in its favor under the controlling principles of law. Because there appear to be no genuine issues of material fact in dispute as to the controlling legal considerations and the federal government is entitled to judgment

as a matter of law, the United States moves for summary judgment on Count I. *See* Fed. R. Civ. P. 56(b) & (c).

* * * *

STATEMENT

* * * *

A. The Legal Requirements for Establishing An Historic Waters Claim

The Convention on the Territorial Sea and the Contiguous Zone preserves the rights of coastal nations to claim inland waters based on historic practices. *See* Art. 7(6), 15 U.S.T. 1609. Nevertheless, international law recognizes that such claims are "exceptional." *E.g.*, Blum, *Historic Titles In International Law* 261 (1965). Such claims are rarely recognized and narrowly construed precisely because they are "contrary to the generally applicable rules of international law." Bouchez, *The Regime of Bays in International Law* 281 (1964). *See*, *e.g.*, 3 Gidel, *Le Droit International Public de la Mer* 623 (1934). Those claims "share one all-important and never-to-be-forgotten attribute: That is that they are normally established at the expense, and to the detriment, of the community of nations as a whole." Blum, *supra*, at 248.

The Supreme Court has articulated comparable standards, drawn from principles of international law, for discerning the United States' historic inland waters in domestic disputes. *United States v. Alaska*, 521 U.S.1, 11 (1997). For a body of water to qualify as an historic bay, the coastal nation "must have effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration" of the community of nations. *Ibid*. ((quoting Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y.B.Int'l L. Comm'n 1, ¶ 132, U.N. Doc. A/CN.4/143 (1962) (Juridical Regime), US-I-4. *Accord United Statesv. Maine*, 475 U.S. 89, 95 & n. 10 (1986); *United States v. Louisiana*, 470 U.S. 93, 101–102 (1985); *United States v. Alaska*, 422 U.S. 184, 189 (1975); *United States v. Louisiana*, 394 U.S. 11, 23–24 n. 27 (1969);

United States v. California, 381 U.S. 139, 172 (1965). "Accordingly, where a State within the United States wishes to claim submerged lands based on an area's status as historic inland waters, the State must demonstrate that the United States: (1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations." *Alaska*, 521 U.S. at 11. The State bears the heavy burden of satisfying these "strict evidentiary requirements." *Ibid.*

1. The actual exercise of sovereign authority. Under international and domestic law, an historic waters claim cannot be predicated upon a mere proclamation of jurisdiction over the relevant waters. Rather the coastal nation must take actions that demonstrate its claim of sovereignty. As the Supreme Court has stated, "a legislative declaration of jurisdiction without evidence of further active and continuous assertion of dominion over the waters is not sufficient to establish the claim." *California*, 381 U.S. at 174. *See*, *e.g.*, Juridical Regime ¶ 98 ("On this point there is full agreement in theory and practice. Bourquin expresses the general opinion in these words: 'Sovereignty must be effectively exercised; the intent of the [coastal nation] must be expressed by deeds and not merely by proclamations.' "); *see*, *e.g.*, Bouchez, *supra* at 239 ("Therefore, our starting point is that, when a [coastal nation] wants to create exclusive territorial competencies contrary to the generally applicable rules of international law, the exercise of sovereignty must be effectively demonstrated."); Pharand, *The Law of the Sea of the Arctic* 107 (1973) ("the coastal [nation] must exercise an effective control over the maritime area being claimed to the exclusion of all other [nations] from the area"). It is "essential that, to the extent that action on the part of the [coastal nation] and its organs was necessary to maintain authority over the area, such action was undertaken." *Louisiana*, 470 U.S. at 114 (quoting Juridical Regime ¶ 99).

Furthermore, the coastal nation's actions must be consistent with the type of historic claim that it asserts. A coastal nation relying on historic title may claim the disputed waters as historic inland waters or as historic territorial sea. *Alaska*, 422 U.S. at 197; *Louisiana*, 394 U.S. at 24 n. 28; Juridical Regime ¶ 13. Accordingly, the Court has recognized that a coastal nation's "exercise of

authority necessary to establish historic title must be commensurate in scope with the nature of the title claimed." *Alaska*, 422 U.S. at 197; *see Louisiana*, 394 U.S. at 24 n. 28 (quoting Juridical Regime ¶ 13). To establish a claim of historic *inland* waters, the coastal nation's "exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation." *Alaska*, 422 U.S. at 197. *See* Juridical Regime ¶ 164 ("If the claimant [nation] allowed the innocent passage of foreign ships through the waters claimed, it could not acquire an historic title to these waters as internal [i.e., inland] waters, only as territorial sea.").

A coastal nation may not only claim historic title, but it may also abandon or disclaim any historic rights. *Louisiana*, 394 U.S. at 28–29; *California*, 381 U.S. at 175. Obviously, if the coastal nation publicly disclaims an area as historic inland waters, that action would normally eliminate any question that the area should be treated as such. In situations in which the United States has publicly disclaimed inland waters contrary to the interest of an individual State, the Court has nevertheless evaluated the circumstances to ensure that the disclaimer is effective. *Louisiana*, 470 U.S. at 111–112. *California*, 381 U.S. at 175. The Court has indicated that a disclaimer is normally "decisive" unless the evidentiary basis for an historic waters claim is "clear beyond doubt." *Ibid.* The Court has further indicated, however, that the United States cannot disclaim "ripened" historic title in ongoing domestic litigation simply to obtain an advantage over a State of the Union. *Louisiana*, 470 U.S. at 111–112; *see also Louisiana*, 394 U.S. at 77.

2. *The continuous usage requirement*. Under international and domestic law, the exercise of overt sovereign authority over the claimed waters must continue for a sufficient period of time "to create a usage." *Louisiana*, 470 U.S. at 102 (quoting Juridical Regime ¶ 132); *accord Louisiana*, 394 U.S. at 23–24 n. 27; *see* Blum, *supra*, at 335–336; Bouchez, *supra*, at 250–254; Pharand, *supra*, at 108; 1 O'Connell, *The International Law of the Sea* 433 (1982). The Court has recognized that "no precise length of time can be indicated as necessary to build the usage on which the historic title must be based. It must remain a matter of judgment

when sufficient time has elapsed for the usage to emerge." *Louisiana*, 470 U.S. at 102 n. 3 (quoting Juridical Regime ¶ 104). Nevertheless, given that a continuous usage must be established among nations, the appropriate length of time must necessarily be "a long period." Jessup, *The Law of Territorial Waters And Maritime Jurisdiction* 476 (1927); *cf.* Bouchez, *supra*, at 256 (suggesting that time "immemorial," although sometimes been used, may be too onerous). If the government has disclaimed historic title before that title has "ripened," then the requirement of "continuity" would not be satisfied.

3. The acquiescence of foreign nations. Under international law, a coastal nation's claim to historic waters, even if supported by sovereign acts and continuing over a long period of time, is ineffective in the absence of acceptance by the community of nations. Juridical Regime ¶ 126. *See*, *e.g.*, Blum, *supra*, at 248–249 (the coastal nation must show that the nation "whose rights have been encroached upon, or are likely to be infringed, by an historic claim has, by its conduct, acquiesced in such an exceptional claim"). "The United States has taken the position that an actual showing of acquiescence by foreign states in such a claim is required, as opposed to a mere absence of opposition." Roach, *supra*, at 31. *Accord* 2 Max Plank Institute, *Encyclopedia of Public International Law* 713 (1995) ("Since maritime historic rights are acquired at the expense of the whole international community, their establishment requires 'international acquiescence' of a representative body of States reflecting international toleration of an otherwise illegal situation."). The Supreme Court has likewise adopted a requirement of "acquiescence." *Alaska*, 521 U.S. at 11. Obviously, the community of nations can acquiesce in a claim by the United States of historic title only if those nations know, or have reason to know, that the United States is claiming sovereignty over a body of water on that basis. The Supreme Court has specifically applied that principle to litigation between the United States and Alaska in the case of Cook Inlet, stating: The failure of other countries to protest is meaningless unless it is shown that the governments of those countries knew or reasonably should have known of the authority being asserted. *Alaska*, 422 U.S. at 200. Accordingly, "[i]n the absence of any awareness on the part

of foreign governments of a claimed territorial sovereignty over lower Cook Inlet, the failure of those governments to protest is inadequate proof of the acquiescence essential to historic title." *Ibid*. *Cf*. *Louisiana*, 470 U.S. at 110 (where "the United States publicly and unequivocally stated that it considered Mississippi Sound to be inland waters," the "failure of foreign governments to protest is sufficient proof of the acquiescence or toleration necessary to [establish] historic title").

4. The burden and quantum of proof. Under international and domestic law, "[t]he onus of proof rests on the [coastal nation] which claims that certain maritime areas close to its coast possess the character of internal waters which they would not normally possess." Juridical Regime ¶ 150 (quoting 3 Gidel, *supra*, at 632). The burden rests with the coastal nation because that nation's claims "constitute an encroachment on the high seas; . . . which remains the essential basis of the whole public international law of the seas." *Ibid*. *See also id*. at 62–63; Strohl, *The International Law of Bays* 252 (1963); Bouchez, *supra*, at 281; Blum, *supra*, at 232; 4 Whiteman, *Digest of International Law* 250 (1965); US-I-1 p.37–39. Furthermore, the coastal nation must put forward an extraordinary quantum of proof:

> If the right to "historic waters" is an exceptional title which cannot be based on the general rules of international law or which may even be said to abrogate these rules in a particular case, it is obvious that the requirements with respect to proof of such title will be rigorous. In these circumstances the basis of the title will have to be exceptionally strong. The reasons for accepting the title must be persuasive; for how could one otherwise justify the disregarding of the general rule in the particular case?

Juridical Regime ¶ 40; *see ibid*. (Because "[T]he coastal [nation] which makes the claim of 'historic waters' is asking that they should be given exceptional treatment; such exceptional treatment must be justified by exceptional conditions." (quoting 3 Gidel, *supra*, at 635)); *accord* Westerman, *The Juridical Bay* 180 (1987)

(The coastal nation asserting an historic claim must provide "extraordinary proof of historic usage.").

The Supreme Court has likewise made clear that, if a State "wishes to claim submerged lands based on an area's status as historic inland waters," the State "must demonstrate" that the necessary conditions are satisfied. *Alaska*, 521 U.S. at 11. The Court has further characterized those conditions as "strict evidentiary requirements." *Ibid*. If the United States has disclaimed historic title, then "questionable evidence of continuous and exclusive assertions of dominion over the disputed waters" is insufficient to overcome that disclaimer. *California*, 381 U.S. at 175. Rather, the disclaimer is normally "decisive" unless historic title is "clear beyond doubt." *Ibid*. A disclaimer would be ineffective only if the United States has disclaimed historic title after the onset of litigation with the affected State and after historic title has ripened. *See Louisiana*, 470 U.S. at 112.

* * * *

The United States is entitled to summary judgment because Alaska has failed to present a sufficient basis, as a matter of law, to establish an historic inland waters claim. To establish that claim, Alaska must show that the United States: (1) actually exercised sovereignty over the waters of the Alexander Archipelago as inland waters; (2) has done so continuously over a period of time sufficiently lengthy to create a usage among nations; and (3) has done so with the acquiescence of the community of nations. Alaska's case fails on each of those elements without regard to any dispute among the parties over questions of fact.

* * * *

b. Juridical bays

The United States moved in count II for an order ruling that the islands of the Alexander Archipelago cannot be assimilated to the mainland or each other to create one or more juridical bays, as defined by the Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1606, 516 U.N.T.S. 205 (1964) ("Convention"). The

order sought would also decree that Alaska does not possess title to the associated submerged lands that it claims on that basis. In its introduction to the U.S. brief on count II, the United States described Alaska's contentions as follows:

> [I]f certain islands were selected from the more than 1000 islands that create the Alexander Archipelago, and those carefully selected islands are collectively treated as mainland, then the 'assimilation' of the islands would create indentations in the mainland. Alaska further contends that those indentations would be sufficiently well-marked, have sufficiently limited closing lines, have sufficient depth of penetration, and enclose sufficient waters therein to meet the requirements, set out in Article 7 of the Convention, for juridical bays.

The U.S. brief explained that, although it disputed both aspects of Alaska's claim (that the islands bear a sufficient relationship to the mainland to qualify for assimilation and that, if assimilated, they would create juridical bays), the United States limited its motion for summary judgment to the first of the contentions, as excerpted below. It did so for two reasons: first, that the governing legal principles do not permit assimilation and second, because, "if the Master found it necessary to consider that question, he might benefit from hearing testimony on the controlling legal principles, which rest, in important part, on international law."

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STATEMENT

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A. The Convention's Requirements

The Supreme Court has determined, and Alaska acknowledges, that the Convention [on the Territorial Sea and the Contiguous Zone] provides the criteria for determining whether a particular

body of water is a juridical bay. Three provisions of the Convention are particularly relevant here: (1) Article 7, which provides the specific criteria for delimiting juridical bays (15 U.S.T. 1609); (2) Article 10, which defines an "island" for purposes of the Convention (15 U.S.T. 1609–1610); and (3) Article 4, which allows, but does not require, nations to enclose fringing islands, such as the Alexander Archipelago, within straight baselines (15 U.S.T. 1608).

1. Article 7. Article 7 sets out the specific criteria that must be satisfied to establish that a physical feature constitutes a juridical bay. The most significant provision, for present purposes, is Article 7(2), which specifies that "a bay is a wellmarked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." 15 U.S.T. 1609. *See*, *e.g.*, *United States v. Louisiana*, 394 U.S. 11 (1969).

2. Article 10. Article 10 of the Convention provides a specific definition of an island that distinguishes that physical feature from the mainland:

> An island is a naturally-formed area of land, surrounded by water, which is above water at high tide.

15 U.S.T. 1609. *See*, *e.g.*, *Alaska*, 521 U.S. at 22–32 (applying Article 10 to an offshore feature). The Convention makes no express provision for assimilating islands to the mainland.

3. Article 4. Article 4 of the Convention provides an alternative rule for determining the seaward line of inland waters . . . in "localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." In those circumstances,

> the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

15 U.S.T. 1608. Article 4 further provides, among other things, that the coastal nation "must clearly indicate straight baselines on

charts, to which due publicity must be given." *Ibid*. The Supreme Court has determined that the decision whether to draw straight baselines "is permissive, not mandatory," and rests with the coastal nation. *Alaska*, 521 U.S. at 9–10. The Court has also recognized that the United States, in keeping with its policy of minimizing inland water claims, "has never opted to draw straight baselines under Article 4." *Id*. at 10.

B. The Supreme Court's Application Of Island Assimilation Principles

Although the Convention makes no express provision for assimilating islands to the mainland, the Supreme Court has ruled that assimilation is permissible in exceptional circumstances. The Court first recognized that possibility in *Louisiana*, 394 U.S. at 60–66. Nevertheless, in the course of its many decisions delimiting coastlines, the Court has actually considered and held that assimilation of an island is appropriate in the case of only one such insular formation—New York's Long Island. *United States v. Maine*, 469 U.S. 504, 514–520 (1985). . . .

* * * *

ARGUMENT

I. Alaska's Theory That A Part Of The Alexander Archipelago Should Be Viewed As Part Of the Mainland Is Untenable As A Matter of Law

* * * *

A. The Island-Complex That Alaska Seeks To Assimilate "Cannot Realistically Be Considered Part of the Mainland"

The Court has adopted a "common-sense approach" to whether islands may be assimilated that focuses on a realistic assessment of the actual geography of the coast in question. *Maine*, 469 U.S. at 517, citing *Louisiana*, 394 U.S. at 64. In this case, the actual

geography of the island-complex shows that it is part of a much larger archipelago of fringing islands, rather than a part of the mainland, and that the island-complex does not enclose any geographically obvious bay. The Convention, through Article 4, specifically addresses that type of geographic feature, and it gives the coastal nation the option to determine whether such waters will be treated as inland waters through the construction of straight baselines. A ruling that the United States *must* treat such a feature as assimilated would eviscerate the United States' discretion under Article 4 and undermine the United States's vital national interests while advancing no vital interest of Alaska.

1. The island-complex is part of a system of fringing islands rather than part of the mainland. A "mere glance at a map of the region" (*Maine*, 469 U.S. at 514) reveals the geographic reality of Southeast Alaska. That coastal area encompasses the Alexander Archipelago, which consists of "fringing islands" along a deeply indented mainland coast. The Alexander Archipelago consists of numerous islands that stretch continuously nearly 260 miles along the mainland. Alaska does not dispute that the island-complex that it seeks to assimilate is part of that archipelago. Alaska nevertheless would have the Master ignore that reality and selectively treat the island-complex, not as part of the archipelago, but as part of the mainland. By doing so, Alaska would have the Master divide the area into two large—and heretofore unnoticed—"bays" and thereby enclose the entire area as inland waters.

Alaska's proposed course is misguided because the geography at issue here, when viewed in its totality rather than in light of an artificially segmented element, presents a familiar situation that the Convention expressly addresses, rather than an exceptional situation that the Convention does not. The Alexander Archipelago, including the island-complex, present the type of "fringe of islands" that Article 4 provides may, *at the discretion of the coastal nation*, be enclosed by straight baselines. *See* 15 U.S.T. 1608. Indeed, the Alexander Archipelago is strikingly similar to Norway's skjaergaard coast, which inspired the concept of "straight baselines." The International Court of Justice ruled in the *Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. 116, that Norway was entitled, but not required, to draw straight baselines to enclose the

skjaergaard. See 1 Shalowitz, *supra*, at 63–75 (discussing the *Fisheries Case*). Article 4 of the Convention was formulated to allow, but not require, Norway's practice. *See Louisiana*, 394 U.S. at 68–71.

. . . [F]or important foreign policy reasons, the United States has *never* opted to draw straight baselines there or anywhere else on its coast. *See Alaska*, 521 U.S. at 10. Rather, the United States has strictly followed the Convention's "normal baseline" rules, which result in the pockets of OSCLA lands at issue in this case. *See id*. at 8–9 (noting that the normal baseline principles create analogous enclaves on Alaska's northern coast).

. . . As the Court has recognized and repeatedly reaffirmed, Article 4 preserves the option, within the United States' control, to decline to draw straight baselines to effectuate its international policies. *Id*. at 72–73; *see United States v. Maine*, 475 U.S. 89, 94 n. 9 (1986); *United States v. Louisiana*, 470 U.S. 93, 99 (1985); *United States v. California*, 381 U.S. 139, 168 (1965). Alaska's proposed application of assimilation principles to selected islands of the Alexander Archipelago, however, would render that option a nullity. Under Alaska' view of the pertinent geography, the selective assimilation of the island-complex would *require* the United States, against its will, to treat the entire area enclosed within the Alexander Archipelago as inland water.

. . . [I]f selected islands are extracted from the Alexander Archipelago, viewed in isolation, and treated as if they were mainland, then—under Alaska's interpretation of assimilation principles that are nowhere explicitly set forth in the Convention —those areas would become inland waters that, unlike the territorial sea, are not subject to the right of innocent passage. The anomaly that Alaska's theory creates is striking. It does not reflect a "common sense approach" to application of the Convention. *Maine*, 469 U.S. at 517. Rather, it is simply a contrivance designed to evade the clear import of Article 4.

2. *The supposed juridical bays that Alaska seeks to create through assimilation are not geographically obvious*. Alaska's assimilation theory introduces another jarring departure from geographic reality. The supposed juridical bays that Alaska identifies—which it names "North Southeast Bay" and "South

Southeast Bay"—are entirely figments of this lawsuit. They are not marked or identified on any map—save those produced for this litigation. . . .

* * * *

The Convention recognizes that the mariner, whether commercial or military, has the right to navigate through territorial seas in innocent passage, but not through inland waters, such as bays. See Art. 14, 15 U.S.T. 1610. Thus, the mariner must be able to identify readily an entrance to inland waters through tools that are readily available, such as nautical charts. For that reason, Article 4 provides that a coastal nation that elects to enclose waters within fringing islands "must clearly indicate straight baselines on charts, to which due publicity must be given." Art. 4(6), 15 U.S.T. 1608. But the Convention imposes no such requirement for juridical bays whose mouths are less than 24 miles wide. Art. 7(4), 15 U.S.T. 1609. To the contrary, waters that satisfy assimilation principles and otherwise qualify as juridical bays are inland waters whether or not the coastal nation has publicly claimed them. *Ibid.* It is therefore imperative, to avoid international conflicts, that United States courts not set precedents that encourage coastal nations to apply assimilation principles in a contrived manner for the purpose of creating geographically non-obvious inland waters.

* * * *

3. The geography of the Alexander Archipelago does not require assimilation to satisfy the interests of the territorial sovereigns. The Supreme Court stated in *Maine* that "[t]he ultimate justification for treating a bay as inland waters, under the Convention and under international law, is that, due to its geographic configuration, its waters implicate the interests of the territorial sovereign to a more intimate and important extent than do the waters beyond an open coast." *Maine*, 469 U.S. at 519. Article 4 recognizes that a "fringe of islands," like the Alexander Archipelago, presents a geographic configuration that is not the equivalent of a bay and does not necessarily implicate the interests of the territorial sovereign to the same extent. The Convention accordingly gives the coastal nation the discretion to determine whether that

configuration should be enclosed by straight baselines. The United States has determined that, on balance, the national interest is not well served by treating such areas as inland waters. That self-restraint is essential if the United States is to avoid setting precedents that would inhibit this Nation's ability to navigate in areas off foreign coasts. Alaska has no vital competing territorial interests that warrant undermining the United States' policy of self-restraint under Article 4 through an expansive application of assimilation principles.

* * * *

At bottom, Alaska's theory of assimilation overlooks the most fundamental sovereign interest that is at stake in this case—the United States' longstanding interest in maintaining a consistent and coherent approach to coast line delimitation to promote this Nation's longstanding policy of freedom of the seas. Alaska's expansive theory of island assimilation, which would override the discretion that Article 4 grants coastal nations to exercise restraint in claiming inland waters, is inconsistent with that policy. Alaska's assimilation theory not only rests on an unrealistic vision of the overall geography at issue, but reflects a short-sighted view of the overarching national interests at stake.

* * * *

C. The United States' Foreign Relations And National Defense Interests Counsel Against Extension Of The Assimilation Principle To This Case

For more than 100 years, the United States has deemed its international interests best served by minimizing national claims of maritime sovereignty. As a naval power and international trader, it has sought to maximize the ability of all vessels to sail the oceans without interference from coastal nations. That interference often begins with liberal interpretations of principles for delimitation of inland waters, typically in the form of excessive claims of historic inland waters or radical applications of straight baseline systems. The United States has identified claims of more

than 80 nations whose illegal maritime claims "threaten the rights of other States to use the oceans." Roach & Smith, *United States Responses to Excessive Maritime Claims* 15 (1996). Additionally they note that the historic trend points toward further diminishment of commonly shared rights to free navigation. *Id.* at 4.

"As a maritime nation, the United States' national security depends on a stable legal regime assuring freedom of navigation on, and overflight of, international waters." Roach, *supra*, at 4. The United States has been the world's preeminent advocate of conservative delimitation principles, discouraging excessive maritime claims primarily through diplomacy but also, where necessary, through military intervention. *Id.* at 4–11. "Even though the United States may have the military power to operate where and in the manner it believes it has the right to, any exercise of that power is significantly less costly if it is generally accepted as being lawful." *Id.* at 8. Many of the excessive maritime claims at which those efforts are directed result from coastal nations' stretching inland water delimitation principles much as Alaska seeks to do here. Alaska's efforts to stretch assimilation principles to turn the straits of the Alexander Archipelago into juridical bays are, in principle, no different than the efforts of foreign nations to stretch Article 4's straight baseline principles or internationally accepted historic waters principles to turn territorial seas into inland waters.

If the Court were to endorse Alaska's approach, the United States' efforts to discourage excessive claims would be seriously undermined. Once unleashed from the status of an "exceptional" claim, the concept of assimilation cannot be readily cabined. For example, if Mitkof, Kupreanof, and Kuiu Islands are assimilated to the mainland, then why not the islands of the Canadian or Russian Arctic? The United States has a long-standing interest in freedom of navigation in both areas and has aggressively opposed those nations' jurisdictional claims. Similarly, under the inevitable extensions of Alaska's theory, is Vancouver Island part of the British Columbia mainland, creating bays of the Straits of Georgia and Queen Charlotte Strait? Are the islands of Tierra del Fuego actually mainland? Why not assimilate Cape Breton Island to Nova Scotia? If the standards of assimilation are so malleable that the

Alexander Archipelago can be converted into two juridical bays, with mouths of more than 120 and 150 miles, then the possibilities for foreign excessive claims is vast. In each instance, the foreign nation might point to the Court's decision in this case as justification for the extravagant claim.

The leap from *Louisiana* and *Maine* to this case is enormous. The island assimilations that the Court recognized in *Louisiana* were limited to canal-riddled marshlands that both parties recognized as mainland. The Court's conclusion in *Maine* that Long Island was assimilated to the mainland had limited international consequences, because Long Island is so closely and uniquely associated with New York City, and the international community had already recognized Long Island Sound as historic inland waters. Neither decision produced a wholesale change in the status of an enormous waterbody. A finding of assimilation here would have exactly that effect.

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5. Prohibition on Alien Crewmen Performing Longshore Work

In keeping with section 258 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1288, alien crewmen may not perform longshore work in the United States, with certain exceptions. One of the exceptions is based on reciprocity, as explained in the excerpts below from the Department of State's proposed rule to update the list of countries whose laws, regulations, or practices prohibit crewmembers on U.S. ships from performing longshore work. 67 Fed. Reg. 6447 (Feb. 12, 2002).

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. . . 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 crew member 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 of State (hereinafter, "the Department") published such a list as a final rule on December 27, 1991 (56 FR 66970), corrected on January 14, 1992 (57 FR 1384). An updated list was initially published on December 13, 1993 (57 FR 65118), and was last published on June 13, 1996.

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 July 14, 2000, the Department sent instructions to U.S. Embassies and Consulates in countries, dependencies and other areas with seaports to determine whether crewmembers aboard U.S. vessels are prohibited from performing longshore work by law, regulation, or in practice in those countries. On the basis of the information received from the Embassies and Consulates, the Department is hereby issuing an amended list.

The list includes 24 new countries: Albania, Antigua, Barbados, Burnei, 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. OTHER BORDER ISSUES: U.S.-MEXICO AGREEMENT ON DELIVERY OF RIO GRANDE WATER TO UNITED STATES

On June 28, 2002, commissioners for the United States and Mexico on the International Boundary and Water Commission

("IBWC") signed Minute 308, "United States Allocation of Rio Grande Waters During the Last Year of the Current Cycle." As described in excerpts below from the Summer 2002 edition of The Boundary Marker, the signing of the minute resolved a long-standing dispute concerning allocation of water from the Rio Grande to the two countries. *See Digest 2001* at 714–716.

The full text from The Boundary Marker, a quarterly publication of the IBWC, is available at *www.ibwc.state.gov/PAO/BndrMkSm2002.pdf.* Minute 308, signed at Ciudad Juarez, Chihuahua, Mexico, June 28, 2002, is available at *www.ibwc.state.gov/Files/Minutes/Minute308.pdf.*

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On June 28, U.S. Section Commissioner Carlos M. Ramirez and Mexican Section Commissioner Arturo Herrera Solis signed Minute 308, "United States Allocation of Rio Grande Waters During the Last Year of the Current Cycle." The minute, which had been the subject of high-level negotiations in Washington, DC, provides for an immediate transfer to the United States of 90,000 acre feet of water from Mexican storage at Amistad and Falcon International Storage Reservoirs to meet the urgent needs of South Texas irrigators. The minute also provides a framework for cooperative efforts to promote water conservation projects and sustainable management of the basin.

Under a 1944 treaty between the two countries, Mexico is required to deliver water to the United States from six of its tributaries to the Rio Grande. The treaty also provides for the United States to deliver Colorado River water to Mexico. Over the past decade, Mexico has incurred an unprecedented deficit in water deliveries to the United States. Efforts to address this issue have been a top priority for the IBWC in recent years and a major concern for President Bush, who has raised the matter directly with Mexican President Fox on a number of occasions.

Minute 308 provides for discussions to continue through the IBWC regarding additional measures to be taken about the

water deficit. Under the agreement, both governments indicate their support for water conservation projects and an interest in developing measures within the IBWC to ensure that these conserved waters on the Mexican side are conveyed to the Rio Grande. Additionally, the minute gives support for drought planning and development of a binational sustainable management plan for the basin. To strengthen the IBWC's role in the area of sustainable management and drought planning, the minute provides for establishment of a forum for the exchange of information and advice to the Commission from government and non-government organizations in both countries, subject to funding.

A Joint Communique by the two governments states that the agreement, "contributes to resolving the water problems along the border taking into account immediate needs, as well as concrete actions to be taken in the medium and long term. In this way, both Governments will assure more efficient use of water in the Rio Grande basin, which will permit guaranteed supply for Mexican users, and compliance with the obligations established under the 1944 Treaty for the benefit of U.S.

C. OUTER SPACE

The Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space ("COPUOS") held its 41st session in Vienna, April 2–12, 2002. At this session, the United States reiterated its support for the efforts underway to draft the Space Assets Protocol to the UNIDROIT Convention on International Interests in Mobile Equipment and its views on the importance of all countries to consider becoming parties to the four core outer space law treaties. It also restated its opposition to adoption of a definition or delimitation of outerspace, which it believed would be counterproductive at this point, and noted that the geostationary orbit, as part of outer space, is not subject to national appropriation by claim of sovereignty of any state, citing articles 1 and 2 of the 1967 Outer Space Treaty. *See Digest 2001* at 716–725. Excerpts below from statements of

the U.S. delegation provide its views on three additional topics: U.S. implementation of relevant treaties, review and possible revision of principles relevant to the use of nuclear power sources in outer space, and review of the concept of the "launching state."

The full text of the U.S. statements at the 41st session is available at *www.state.gov/s/l/c8183.htm.* The Report of the 41st Session (U.N. Doc A/AC.105/787) is available at *www.oosa.unvienna.org/repidx.html.*

1. Status of International Treaties Governing the Use of Outer Space

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. . . I would like to touch upon the issue of domestic implementation of the treaties. During last year's LSC meeting, I emphasized the United States' view that we must all focus on our domestic implementation of the treaties. As you are aware, the Registration Convention provides that a launching State shall register a space object on its registry. In that regard, I would like to share with you some steps that the United States is taking with respect to this Convention. During the past year, the United States has been engaged in a process of upgrading the U.S. national registry of space objects so it is accessible via the Internet and can be updated electronically, to enhance the utility of our national registry. As part of that process, we have undertaken to clarify the domestic criteria for including objects on the U.S. Registry. This is intended to ensure that U.S. owners/operators of space objects and non-U.S. entities have a clear understanding as to the circumstances under which space objects are and are not registered by the United States. We intend to include on the U.S. registry all space objects that are owned or operated by U.S. private or governmental entities and launched from inside or outside U.S. territory. In general, the United States will not include on its registry non-U.S. payloads that are launched from U.S. territory or facilities. It is our view that such non-U.S. payloads should be included on the registry of the State of the payload's owner/operator because that State is

best positioned to exercise continuing supervision. In addition, we will continue our practice of including certain non-functional objects on the U.S. Registry.

We are also carefully reviewing those objects brought to our attention by the Office for Outer Space Affairs, based on its search of the UN online database, that represent potential U.S. objects that have not been registered, or objects that have been registered by the United States and another State, to determine whether revisions to the Registry are required and how to avoid such problems in the future.

We invite other States to undertake a similar clarification of their registration practice. As States clarify and improve their domestic practice, overall international practice will be enhanced and all nations will benefit. The promotion of increased international cooperation in the registration area may be an appropriate activity for this Subcommittee and the UN Office for Outer Space Affairs.

2. Review and Possible Revision of the Principles Relevant to the Use of Nuclear Power Sources in Outer Space

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My delegation firmly believes that the continued implementation of the [Scientific and Technical Committee's ("STSC's")] work plan will be crucial for establishing a firm scientific and technical consensus for any future [Principles Relevant to the Use of Nuclear Power Sources in Space ("NPS")] deliberations. The report reflecting several years of data gathering and deliberations was completed by the NPS Working Group and adopted by the STSC. The progress that has been made to date within the STSC has been significant and has set the stage for the final year of the STSC work plan next year. At that time, we will have an opportunity to consider what next steps with regard to NPS should be taken within COPUOS, if any. . . .

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3. Review of the Concept of the "Launching State"

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With respect to the issue of the definition of "launching State," my government would like to reiterate the point it made last year that problems have not arisen in practice with regard to the definition of the term launching State as used in the Registration and Liability Conventions. The Registration and Liability Conventions define the term a "launching State" as a State that launches or procures the launching of a space object or a State from whose territory or facility a space object is launched. Although both Conventions create certain obligations for launching States, they have separate purposes. The Liability Convention defines the circumstances in which a launching State bears liability to pay compensation for certain damage caused by its space object. The drafters of the 1972 Liability Convention emphasized the victim-oriented nature of the Convention, seeking to maximize the potential for recovery by injured parties with a broad definition of the term "launching State."

Under Article VI of the Outer Space Treaty, States Parties bear international responsibility for national activities in outer space and the activities of non-governmental entities in outer space require authorization and continuing supervision by the appropriate State party to the treaty. As the Secretariat's report notes, ensuring the safety of space activities is an important policy behind most national space laws, in particular laws governing the launch of objects into outer space. Individual launching States are uniquely suited to attain the goal of protecting nationals through domestic licensing regimes. This conclusion is supported by not only the report of the Secretariat and the work of the Chairman of the Working Group on the Launching State agenda item, Kai-Uwe Schrogl, but also by recent industry/academic fora on the subject, including the Workshop on International Legal Regimes Governing Space Activities, held in early December 2001, in Scottsdale, Arizona, by the American Astronautical Society.

The Registration Convention requires at least one launching State as registrant for a space object. The nature and criteria of registration, however, are not explicitly linked to a launching State's

responsibility under the Liability Convention, including vis-à-vis other launching States, or of responsibility a State may bear as a State Party to the Outer Space Treaty. In practice, the frameworks established by the Registration and Liability Conventions have been effective in facilitating outer space activities, including launch activities. Both governmental and private launches occur on a regular basis and they have been able to proceed with the support of private insurance.

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Cross References

Interdiction of vessel carrying scud missiles to Yemen, **Chapter 18.C.3.f.**

Protection of marine environment and marine conservation, **Chapter 13.A.3.**

Control over certain submerged lands and marine resources off the coast of the Northern Mariana islands, **Chapter 5.B.**

Chapter 13

Environment and other Transnational Scientific Issues

A. ENVIRONMENT

1. World Summit on Sustainable Development

On September 4, 2002, the United States joined consensus in the adoption of the Johannesburg Declaration on Sustainable Development and the Johannesburg Plan of Implementation of the World Summit on Sustainable Development. The United States supported a UN proposal to use the summit process as a vehicle to create new voluntary, project-specific partnerships among governments, international organizations, and non-governmental entities (including the private sector). The United States launched twenty-seven such initiatives, including four "signature partnerships": (1) Water for the Poor Initiative; (2) Clean Energy Initiative; (3) Initiative to Cut Hunger in Africa; and (4) Congo Basin Forest Partnership. Information concerning these and other partnerships is available at *www.state.gov/g/oes/sus/pr*. Secretary of State Colin L. Powell welcomed the outcome of the summit:

> This Summit has cemented a new vision of sustainable development. The Johannesburg Plan of Action consolidates our work plans into one common agenda that includes our best thinking on sustainable development. Plans are good. But [only] actions can put clean water in the mouths of thirsty girls and boys, prevent the

transmission of a deadly virus from mother to child, and preserve the biodiversity of a fragile African ecosystem.

The full text of the Secretary's remarks is available at *www.state.gov/secretary/rm/2002/13235.htm*.

a. U.S. goals for summit

The U.S. goals for the summit had been set forth in a vision statement by Under Secretary of State for Global Affairs Paula J. Dobriansky, issued on May 23, 2002, and excerpted below.

The full text of Secretary Dobriansky's statement is available at *www.state.gov/g/oes/sus/wssd*.

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We believe sustainable development begins at home and is supported by effective domestic policies, and international partnerships. Self-governing people prepared to participate in an open world marketplace are the very foundation of sustainable development. President Bush has emphasized that the hopes of all people, no matter where they live, lie in greater political and economic freedom, the rule of law, and good governance. These fundamental principles will generate and harness the human and financial resources needed to promote economic growth, a vibrant civil society, and environmental protection. Democracy and respect for human rights empower people to take charge of their own destinies. We pledge strong support for efforts to promote peace, security, and stability, and to enhance democracy, respect for human rights, open and transparent governance, and the rule of law.

We endorse and continue to support national efforts to improve transparency and domestic governance, and to fight against corruption because we share, together with our partners, a strong commitment to the reality that only open, law-based societies that foster private investment, enterprise and entrepreneurship can unleash our human potential to build lasting and widely-shared

prosperity. We also believe investment in basic health, education, and the environment is vital to advance social development and give every person, especially children, a chance at sharing in the benefits of economic growth.

We recognize poverty remains a global problem of huge proportions that demands our action. Following the successful outcomes of the Doha Trade Ministerial, the Monterrey Conference on Financing for Development and the World Food Summit, the World Summit on Sustainable Development can take practical measures to enhance human productivity, reduce poverty and foster economic growth and opportunity together with environmental quality. We can strive together for freer and more open societies, thriving economies, healthy environments, and help developing countries integrate fully into the global economy to reap the benefits from international trade, investment, and cooperative partnerships.

We will work effectively to address the challenges of sustainable development in partnership with governments, the private sector, NGOs, and other elements of civil society. We invite developed and developing nations alike to join us to:

- Open our economies and societies to growth;
- Provide freedom, security, and hope for present and future generations;
- Provide all our people with the opportunity for healthy and productive lives;
- Serve as good stewards of our natural resources and our environment.

To this end, we will work to advance through concrete actions the following goals:

- Reduce the number of people living without safe drinking water and provide integrated, watershed approaches to manage water and land resources;
- Enhance access to and adoption, where appropriate, of clean energy, including renewables, from village to metropolis;
- Stem the global pandemic of AIDS, and drastically reduce tuberculosis and malaria;
- Ensure universal access to basic education, and eliminate gender disparities;

- Reduce hunger and increase sustainable agricultural productivity in the developing world without further degradation of forests and fragile lands; and
- Manage and conserve our forests and the vital resources of our oceans.

In partnership, we will work to unite governments, the private sector and civil society to strengthen democratic institutions of governance, open markets, and to mobilize and use all development resources more effectively. These resources include domestic savings, trade and investment, traditional aid and private philanthropy, capacity building programs, and efforts to promote the spread of environmentally sensitive industrial, agricultural, educational and scientific technologies. Our shared commitment will be to provide all people with the opportunities to lead healthy, productive, and fulfilling lives.

b. U.S. interpretation of summit declaration

The United States submitted a written statement on interpretation of the declaration, set forth below. The statement is included in the final report of the World Summit on Sustainable Development. U.N. Doc. A/CONF.199/20 at 145.

The U.S. statement is available at *www.state.gov/s/l/c8183.htm.*

Principle 7 of the Rio Declaration on Environment and Development

As the United States of America stated for the record at the 1992 United Nations Conference on Environment and Development, the United States understands and accepts that principle 7 of the Rio Declaration on Environment and Development highlights the special leadership role of developed countries, based on their industrial development, experience with environmental protection policies and actions, and wealth, technical expertise and

capabilities. The United States does not accept any interpretation of principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution of the responsibilities of developing countries under international law.

The phrase "common but differentiated responsibilities" is contained in the second sentence of Rio principle 7, which provides that "in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities." The United States interprets references to common but differentiated responsibilities in the Plan of Implementation in this manner.

Corporate responsibility

During the conference, the Chairman of the Main Committee stated that it was "the collective understanding" of the contact group on means of implementation that paragraph 49 of the Plan of Implementation, regarding corporate responsibility and accountability, refers to existing intergovernmental agreements and international initiatives, and that this understanding should be reflected in the final report of the conference. The United States associates itself with this statement and notes that this understanding is of critical importance to the proper understanding and implementation of paragraph 49.

Biological diversity

While joining the consensus on the Plan of Implementation, the United States reserves its position with respect to paragraph 44(o). This paragraph envisages the negotiation "within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources." In the context of the final negotiations on this paragraph, the words "legally binding" were deleted before the word "regime" at the request of numerous

delegations. In light of this negotiating history, the United States understands that the undertaking envisaged in this paragraph would not entail the development of a legally binding instrument. The United States further considers that this paragraph constitutes an invitation for States to explore non-binding tools to better implement the Convention on Biological Diversity and the Bonn Guidelines, the latter of which were adopted in April of this year. It is the view of the United States that any initiatives in this area must fully accord access to genetic resources and respect rights and obligations under international law.

Health

The United States understands that no language in the Plan of Implementation, including references to health, "reproductive and sexual health", "basic health services" and "health-care services", or references to rights or freedoms, can in any way be interpreted as including or promoting abortion or the use of abortifacients. Similarly, the United States does not consider any reference in the document to United Nations conferences or summits, including the World Summit for Children, the United Nations Conference on Environment and Development, the International Conference on Population and Development, the World Summit for Social Development, and the Fourth World Conference on Women, and their follow-ups, to constitute an endorsement or promotion of abortion. The United States does, however, support the treatment of injuries or illnesses caused by illegal or legal abortion, including, for example, compassionate post-abortion care.

Official development assistance

The United States reaffirms that it does not accept international aid targets based on percentages of donor gross national product. The United States does believe that aid should be increased to those developing countries making a demonstrated commitment to governing justly, investing in their own people, and promoting enterprise and entrepreneurship.

Nature of the Plan of Implementation and the Johannesburg Declaration

The United States highlights the importance of the Plan of Implementation and the Johannesburg Declaration and notes that, like other such declarations and related documents, these documents adopted at this conference contain important political goals and coordinated plans of action, but do not create legally binding obligations on States under international law.

2. Pollution and Related Issues

a. Stockholm Convention on Persistent Organic Pollutants

(1) Transmittal to Senate for advice and consent to ratification

On May 6, 2002, President George W. Bush transmitted to the Senate for advice and consent to ratification the Stockholm Convention on Persistent Organic Pollutants, done at Stockholm, May 22–23, 2001. S. Treaty Doc. No. 107–5 (2002); *see also* 40 I.L.M 532 (2001). The letter from the President to the Senate and excerpts from the letter and report from Secretary of State Colin L. Powell submitting the treaty to the President are provided below.

LETTER OF TRANSMITTAL

The White House, May 6, 2002.

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Stockholm Convention on Persistent Organic Pollutants, with Annexes, done at Stockholm, May 22–23, 2001. The report of the Secretary of State is also enclosed for the information of the Senate.

The Convention, which was negotiated under the auspices of the United Nations Environment Program with the leadership and

active participation of the United States, commits Parties to take significant steps, similar to those already taken by the United States, to eliminate or restrict the production, use, and/or release of 12 specified persistent organic pollutants (POPs). When I announced that the United States would sign the Convention, I noted that POPs chemicals, even when released abroad, can harm human health and the environment in the United States. The Convention obligates Parties to take measures to eliminate or restrict the production, use, and trade of intentionally produced POPs, to develop action plans to address the release of unintentionally produced POPs, and to use best available techniques to reduce emissions from certain new sources of unintentionally produced POPs. It also includes obligations on the treatment of POPs stockpiles and wastes, as well as a science-based procedure to add new chemicals that meet defined criteria.

The United States, with the assistance and cooperation of nongovernmental organizations and industry, plays an important international leadership role in the safe management of hazardous chemicals and pesticides. This Convention, which will bring over time an end to the production and use of certain of these toxic chemicals beyond our borders, will positively affect the U.S. environment and public health. All relevant Federal agencies support early ratification of the Convention for these reasons, and we understand that affected industries and interest groups share this view.

I recommend that the Senate give prompt and favorable consideration to the Convention and give its advice and consent to ratification, subject to the understandings described in the accompanying report of the Secretary of State, at the earliest possible date.

George W. Bush.

LETTER OF SUBMITTAL

August 1, 2001.

The President,
The White House.
The President:

* * * *

Chemical synthesis and production advances have been responsible for many important benefits currently enjoyed by modern society. However, as scientific knowledge about these substances has increased, it has become clear that the continued production and use of certain chemicals and pesticides with particular traits carries with it inherent risks and poses both environmental and health hazards. The chemicals of global concern that are the subject of this Convention are often referred to as persistent organic pollutants (POPs). These harmful chemicals share four basic characteristics that cause them to adversely affect human health and the environment: (1) they are toxic; (2) they persist in the environment for long periods of time; (3) they circulate globally through the atmosphere and oceans to regions far from their source of origin; and (4) they biomagnify as they move up through the food chain, accumulating in the fatty tissue of higher organisms, including in other foods consumed by Americans.

There is evidence of continuing transboundary deposition of POPs chemicals far from their sources. Indigenous people in Alaska and elsewhere in the United States are particularly at risk due to their reliance on a subsistence diet. This Convention will reduce or eliminate certain POPs that continue to be released outside the United States and which pose a threat to U.S. public health and the environment.

The United States has already taken substantial action to address the risks associated with those POPs chemicals currently covered by the Convention. Many other countries, including some developing countries, have also taken steps to address these risks. Nonetheless, certain of these chemicals continue to be used and produced, mostly in developing countries.

The Convention commits Parties to take significant steps, similar to those already taken by the United States, to eliminate or restrict the production, use and/or release of specified POPs. It initially identifies twelve chemicals, often referred to as the "dirty dozen." Several of these are intentionally produced for use either as pesticides or industrial chemicals (e.g., DDT); some are produced and released as incidental byproducts of other processes (e.g., dioxin). Under the Convention, all of the intentionally produced POPs except DDT are slated for elimination of production and

use. In recognition of the humanitarian need to use DDT for disease vector control, notably to fight malaria, the Convention allows its use for this purpose, while encouraging the development of effective and economically viable alternatives. The Convention obligates Parties to develop action plans to address the release of byproduct POPs and to use best available techniques to reduce emissions from certain new sources of such POPs. It also imposes controls on the handling of POPs wastes and on trade in POPs chemicals. Additionally, it includes a science-based procedure to add new chemicals that meet defined criteria to the lists of POPs subject to the Convention.

The Convention does not differentiate in its basic obligations between developing and developed countries. The Convention does establish a flexible framework to provide technical and financial assistance to help developing countries implement their commitments.

The United States played a leading role in negotiating the Convention, which was developed under the auspices of the United Nations Environment Program (UNEP). Throughout the negotiations, the Department of State and interested Federal agencies, including the Environmental Protection Agency (EPA), the Department of Commerce, the United States Trade Representative, the Department of Health and Human Services, and the Department of Agriculture, consulted with the Congress, industry and environmental organizations. The relevant Federal agencies support expeditious ratification of the Convention by the United States. The Convention has the strong support of U.S. industry and environmental organizations.

The following analysis reviews the Convention's key provisions and sets forth the proposed understandings of the United States with respect to several elements.

* * * *

Article 2—Definitions

. . . It should be noted that, with respect to obligations that require Parties to take action on chemicals listed in Annexes A, B or C, the term "Party" includes only those Parties that are bound by particular listings for chemicals that are added in the future.

In order to make this definition clear, it is recommended that the following understanding be included in the U.S. instrument of ratification:

> The United States understands that the term "Party" as defined in Article 2 includes only those Parties that are bound by particular listings for chemicals that are added in the future to Annexes A, B or C with respect to the obligations to take action on those chemicals.

* * * *

Article 6—measures to reduce or eliminate releases from stockpiles and wastes

Article 6, which contains obligations regarding the treatment of POPs wastes, generally requires that Parties take certain specified measures to ensure that such wastes are managed in a manner protective of human health and the environment. The United States has sufficient existing authority under the [Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") and the Toxic Substances Control Act ("TSCA")], the Comprehensive Environmental Responsibility, Compensation and Liability Act, 42 U.S.C. Sec. 9601 et seq., and the Resource Conservation and Recovery Act, 42 U.S.C. Sec. 6901 et seq., ("RCRA") to implement almost all of the obligations in Article 6.

* * * *

Paragraph 2 directs the [Conference of the Parties ("COP")] to cooperate with the appropriate bodies of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal to develop certain guidance relating to the handling of POPs waste. Paragraph 2(c) calls on the COP to work to establish, in cooperation with the Basel COP, "as appropriate," the concentration levels of the chemicals listed in Annexes A, B and C in order to define the low POP content referred to in paragraph 1(d). The criteria of what constitutes "low" POP content is an important factor in determining whether "other disposal" is permitted under paragraph 1(d). The United States does not

interpret paragraph 2(c), however, as giving a mandate to the COP to set a definition of the term "low" that would be binding on Parties through paragraph 1(d): indeed, paragraph 1(d) makes it clear that meaning of "low" is to be determined "taking into account international rules, standards and guidelines, including those that may be developed pursuant to paragraph 2. . . ." In order to clarify and emphasize this view, it is recommended that the following understanding be included in the U.S. instrument of ratification:

> It is the understanding of the United States of America that any work completed by the Conference of the Parties under paragraph 2(c) of Article 6 would not be considered binding on Parties, but rather would constitute non-binding guidance on the meaning of the term "low" that Parties would take into account in accordance with paragraph 1(d) of Article 6.

* * * *

Domestic implementation of the POPs Convention

As noted above, the United States could implement nearly all Convention obligations under existing authorities. There are exceptions, however, where limited additional legislative authority, through changes to FIFRA and TSCA, will be sought to ensure the United States' ability to implement provisions of the Convention. These changes primarily concern the obligations in Article 3, which concerns measures to eliminate production and use of listed chemicals, as well as to control their import and export. In addition, statutory authority to prohibit any recycling of POPs substances will also be sought, in order to ensure effective U.S. compliance with paragraph 1(d)(iii) of Article 6. Other targeted changes may also be sought to ensure our ability to participate effectively in negotiations regarding proposed amendments to add chemicals, and to ensure that the United States is able to ratify such amendments in a timely manner, if it so chooses.

* * * *

Respectfully submitted,

Colin L. Powell.

(2) Implementing legislation

On April 11, 2002, the Secretary of State and the Administrator of the Environmental Protection Agency submitted to the Congress legislation needed to implement not only the Stockholm Convention but also the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 38 I.L.M. 1 (1999), and the Protocol on Persistent Organic Pollutants to the 1979 Convention on Long-Range Transboundary Air Pollution, 37 I.L.M. 505 (1998). This legislation would amend the Toxic Substances Control Act ("TSCA") as well as the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") by providing the EPA with the authority to eliminate or restrict the production, use, and release of the 12 chemicals targeted in the Stockholm convention. Implementing legislation had not been enacted at the end of 2002.

b. Stratospheric ozone depletion

On October 9, 2002, the Senate gave advice and consent to ratification of amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted at Montreal on September 15–17, 1997, by the Ninth Meeting of the Parties to the Montreal Protocol, and at Beijing by the Eleventh Meeting of the Parties to the Montreal Protocol, December 3, 1999 148 CONG. REC. S10,232 (Oct. 9, 2002). The documents transmitting the amendments to the Protocol to the Senate are available in S. Treaty Doc. No. 106–10 (1999) and S. Treaty Doc. No. 106–32 (2000) respectively.

c. Climate change

(1) Clear skies and global climate change initiatives

On February 14, 2002, President George W. Bush announced the clear skies and global climate change initiatives. The

clear skies initiative would cut power plant emissions of the three worst air pollutants—nitrogen oxides, sulfur dioxide, and mercury—by 70 percent. *See* Fact Sheet: President Bush Announces Clear Skies & Global Climate Change Initiatives, *www.whitehouse.gov/news/releases/2002/02/20020214.html*.

Excerpts below from a fact sheet issued by the Department of State on October 23, 2002, describe the global climate change initiative.

The full text of the fact sheet is available at *www.state.gov/g/oes/rls/fs/2002/14576.htm*.

On February 14, 2002, President Bush committed the United States to an ambitious climate change strategy that will reduce domestic greenhouse gas (GHG) emissions relative to the size of the American economy. The United States will achieve this goal by cutting its GHG intensity—how much it emits per unit of economic activity—by 18 percent over the next 10 years. This strategy will set America on a path to slow the growth of greenhouse gas emissions, and—as the science justifies—to stop, and then reverse that growth. The President's policy also continues the United States' leadership role in supporting vital climate change research, laying the groundwork for future action by investing in science, technology, and institutions. In addition, the United States' strategy emphasizes international cooperation and promotes working with other nations to develop an efficient and coordinated response to global climate change. In taking prudent environmental action at home and abroad, the United States is advancing a pro-growth, pro-development approach to addressing this important global challenge.

Cutting GHG Intensity By 18 percent Over The Next 10 Years

GHG intensity is the ratio of greenhouse gas emissions to economic output. The President's goal is to lower the United States' rate of emissions from an estimated 183 metric tons per million dollars of Gross Domestic Product (GDP) in 2002, to 151 metric tons

per million dollars of GDP in 2012. By slowing the growth of greenhouse gases, this policy will put America on a path toward stabilizing GHG concentration in the atmosphere in the long run, while sustaining the economic growth needed to finance our investments in a new, cleaner energy structure. America is already improving its GHG intensity; new policies and programs will accelerate that progress, avoiding more than 500 million metric tons of GHG emissions over the next 10 years—the equivalent of taking nearly one out of every three cars off the road. This goal is comparable to the average progress that nations participating in the Kyoto Protocol are required to achieve.

Laying the Groundwork for Current and Future Action

Unprecedented Funding for Climate Change-Related Programs. The President's FY 2003 budget request provides $4.5 billion for global climate change-related activities—a $653 million or 17 percent increase over FY 2002—more than any other nation's commitment. This increase includes nearly $1.8 billion for climate change science, $1.3 billion for climate technologies, and $555 million for the first year of funding for a 5-year, $4.6 billion commitment to tax credits for renewable energy and energy efficient sources and technologies. The budget request also includes $279 million for international activities—a 29 percent increase.

A New Tool to Measure and Credit Emissions Reductions. In his February announcement, the President directed the Secretary of Energy to recommend reforms to the Department's existing voluntary greenhouse gas registry, to: (1) ensure that businesses that register voluntary reductions are not penalized under a future climate policy, and (2) give credit to companies that can show real emissions reductions. Toward this end, the United States will improve its voluntary GHG registry to enhance the registry's accuracy, reliability and verifiability, working with and taking into account emerging domestic and international approaches. These improvements will give businesses incentives to invest in new, cleaner technology and voluntarily reduce greenhouse gas emissions.

National Energy Policy. The United States' National Energy Policy recommends tax incentives, business sector challenges, and improved transportation programs, to promote energy efficiency and conservation and to reduce emissions of greenhouse gases through the use of alternative, renewable, and cleaner forms of energy.

Increased Incentives for Carbon Sequestration. To increase the amount of carbon stored by America's farms and forests, the United States will invest up to $47 billion in the next decade for conservation on its farms and forest lands. This partnership with farmers and small land owners will help protect land, water, and air, secure and enhance habitat for wildlife, and greatly expand opportunities to store significant quantities of carbon in trees and the soil, as well as promote other activities to mitigate GHG emissions.

Working With Other Nations to Develop an Efficient and Effective Global Response

Enhanced support in the developing world and for bilateral international cooperation on climate change initiatives. The President's FY2003 budget supports significant funding for science and technology research, development and transfer, including:

> $155 million for the United States Agency for International Development (USAID), which continues to be a major source of climate technology assistance to developing countries.
> $50 million for tropical forest conservation, including $40 million under the Tropical Forest Conservation Act to help countries redirect debt payments toward protecting tropical forests, which store millions of tons of carbon.
> A significant share of the overall funding required to meet the President's commitment of $25 million for climate observation systems in developing countries.
> $68 million for the Global Environment Facility (GEF), to help developing countries better measure and reduce emissions, and invest in clean and renewable energy technologies. In addition, the United States has pledged

> $500 million over the next four years for the GEF, to help developing countries address environmental problems with potential global impact. The commitment represents a 16 percent increase over our contribution to the previous replenishment.

Bilateral partnerships. The United States is committed to working with other nations, especially developing countries, to build future prosperity along a cleaner and better path. The President's strategy promotes cooperative relationships with other countries, so that our objectives and activities complement each other in addressing climate change effectively. Over the past year, the United States has engaged in bilateral partnerships with Australia, Canada, China, seven Central American countries (Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama), the European Union, India, Italy, Japan, the Republic of Korea and New Zealand, on issues ranging from climate change science to energy and sequestration technology to policy approaches.

(2) UN Framework Convention on Climate Change

Harlan L. Watson, Senior Climate Negotiator and Special Representative and head of the U.S. Delegation, provided the views of the United States in remarks to the eighth session of the Conference of Parties (COP-8) to the UN Framework Convention on Climate Change in New Delhi, October 25, 2002. Excerpts from his remarks are set forth below.

The full text of Mr. Watson's remarks is available at *www.state.gov/g/oes/rls/rm/2002/14758.htm.*

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First, we believe that the Delhi Declaration should welcome the increased focus in the [UN Framework Convention on Climate Change ("UNFCCC")] on adaptation. Effective, results-based adaptation strategies will be a key component, along with mitigation policies, of an effective climate change strategy for both developing and developed countries.

Second, we believe that the Delhi Declaration should highlight the importance of addressing climate change in the broader context of sustainable development.

The year 2002 will be remembered as an historic one in our universal quest for sustainable development. At the World Summit on Sustainable Development (WSSD) in Johannesburg, which built upon outcomes achieved earlier this year at Monterrey and Doha, we reaffirmed our commitment to sustainable development in the Johannesburg Declaration on Sustainable Development.

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It is then, in this broader context that we see our efforts to address climate change. Both climate change and sustainable development are complex, long-term challenges that will require sustained commitment and focus on the part of the nations of the world. Our choice of approaches to address climate change, if they are to be effective in the long run, must recognize that the hope of growth and opportunity and prosperity is universal —that it is the dream and right of every society on our globe. And we must also recognize that it would be unfair—indeed, counterproductive—to condemn developing nations to slow growth or no growth by insisting that they take on impractical and unrealistic greenhouse gas targets.

The United States is committed to a sustainable climate change policy—one that is based on the common-sense idea that economic growth is key to environmental progress, because it is growth that provides the resources for investment in clean technologies. We are also working to foster technological advances through research and development, investing in institutions and initiating public-private partnerships that will promote sustainable development and climate change policy.

We believe this is an approach that will harness the power of markets, the creativity of entrepreneurs, and draw upon the best scientific research—one that will make possible a new partnership with the developing world to meet our common environmental and economic goals.

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d. Disposal of hazardous wastes

On October 9, 2002, the United States and India entered into an agreement pursuant to Article 11 of the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, adopted in Basel on March 22, 1989, UN Doc. EP/IG.80/3, *reprinted in* 28 I.L.M. 649 (1989) ("the Basel Convention"). The agreement, which entered into force upon signature for one year, provides for the transboundary movement of glass cullet contaminated with mercury from India to the United States. On October 15, 2002, the United States and Costa Rica also renewed their bilateral agreement under article 11 for another year.

India and Costa Rica are both parties to the Basel Convention, but the United States, while a signatory, is not at present a party. Under article 4 ¶ 5 of the Basel Convention, parties are prohibited from permitting hazardous wastes or other wastes to be exported to a non-party or to be imported from a non-party. Article 11 ¶ 1, however, provides that notwithstanding the provisions of article 4 ¶ 5, parties may enter into bilateral, multilateral or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with parties or non-parties, provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by the Basel Convention. Such agreements or arrangements must also stipulate provisions that are not less environmentally sound than those provided for by the Basel Convention, in particular taking into account the interests of developing countries.

Article 1 of the agreement between the United States and India obligates India to comply with the provisions of the Basel convention as well as the provisions of the agreement. Under the agreement, the Ministry of Environment and Forests, as the competent authority for India, notifies the Environmental Protection Agency, as the competent authority for the Untied States, of proposed shipments of mercury-contaminated glass cullet. As to the United States,

article 2 of the agreement, set forth below, makes clear that its obligations under the agreement are subject to U.S. law. Article 4 of the agreement also requires India to ensure that, if the transboundary movement of contaminated glass cullet cannot be completed in accordance with the terms of the contract and alternative environmentally sound arrangements for its management cannot be made, the glass cullet is taken back to India by the exporter, or, if necessary, by India itself.

In the United States, regulations implementing the terms of such bilateral hazardous waste agreements are promulgated under the Resource Conservation and Recovery Act, Pub. L. No. 94–580, 90 Stat. 2795, 42 U.S.C. §§ 6901–6992(k) ("RCRA"). Regulations relevant to hazardous waste management under the U.S.-India and U.S.-Costa Rica agreements can be found at 40 C.F.R. § 262.60 (2002).

The full text of the U.S.-India agreement is available at *www.state.gov/s/l/c8183.htm.*

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Article 2
Notification and Consent

1. The competent authority of India, which for the purposes of this agreement is the Ministry of Environment and Forests (MoEF), shall notify, in writing, the competent authority of the United States, which for the purposes of this agreement is the Environmental Protection Agency (EPA), of the proposed transboundary movement(s) of glass cullet containing mercury to be carried out pursuant to this agreement. This notice shall contain the declarations and information specified in Annex V A of the Basel Convention. If any information in the notice changes, then a new notice shall be provided.
2. The EPA shall, in accordance with applicable U.S. law, respond to MoEF in writing, consenting to the transboundary movement(s) with or without conditions, denying permission for the transboundary movement(s), or requesting additional information. EPA shall seek to respond within 30 days of receipt of the notice.

3. EPA's consent, including conditional consent, may be withdrawn or modified for good cause; in such case, EPA shall notify MoEF as soon as possible.
4. India shall not allow a transboundary movement of glass cullet containing mercury to commence until:

   (a) MoEF has received confirmation from the exporter of the existence of a contract between the exporter and the intended facility in the United States specifying:
      (i) The environmentally sound management of the glass cullet containing mercury, (which is satisfied by specifying that it will be managed in accordance with applicable U.S. laws); and
      (ii) Alternative arrangements, including which party to the contract is to pay for alternative arrangements, for the proper management in an environmentally sound manner of the glass-cullet containing mercury in the United States or India, in the case where the intended facility cannot or will not accept it; and,
   (b) MoEF has received from EPA written consent to the transboundary movement(s).

5. India shall not allow a transboundary movement to commence if it has reason to believe that glass cullet containing mercury will not be managed in an environmentally sound manner.
6. The management of the glass cullet containing mercury once subject to the jurisdiction of the United States, pursuant to this agreement, shall be subject to applicable U.S. law.

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3. Protection of the Marine Environment and Marine Conservation

a. Oceans

On December 10, 2002, Ambassador Mary Beth West, Deputy Assistant Secretary for Oceans and Fisheries, U.S. Department of State, addressed the 57th session of the United Nations, in Plenary Session. In her prepared statement, she

indicated that the United States co-sponsored agenda item 25, a resolution on oceans and the law of the sea introduced by Brazil. Ambassador West also introduced Resolution A57/L.49 concerning a number of fisheries issues, and resolution A57/L.50 concerning the UN Fish Stocks Agreement. Excerpts below provide the views of the United States on these related issues.

The full text of Ambassador West's prepared statement is available at *www.un.int/usa/02_214.htm*.

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We see the resolutions before us today as a thoughtful and balanced assemblage of current oceans issues drawn from the priorities and interests of member states. The resolutions are not all-inclusive, but they represent consensus on ways to tackle many of the challenges we face in making the oceans safe and healthy environments for sustainable development.

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The United States believes that ratifying and carrying out international fisheries management agreements is an important tool in protecting international fish stocks, promoting sustainable use of living marine resources, and providing food security.

We are pleased that the importance of implementation and the means to build capacity for better management are emphasized in both of the fisheries resolutions before us today.

A year ago the UN Fish Stocks Agreement entered into force, a real milestone for international fisheries management and for implementation of UNCLOS. The United States believes that the Fish Stocks Agreement is a significant adjunct to UNCLOS. We urge all States to become parties to the Fish Stocks Agreement as well as to the FAO Compliance Agreement. We look forward to participating in the second informal consultation between States Parties to the Fish Stocks Agreement. We are also pleased that next year we can look forward to a single fisheries resolution, a format we believe will reflect and facilitate a more unified approach to fisheries issues at the UN.

This year included another international milestone, the successful World Summit on Sustainable Development-WSSD. The Plan of Implementation agreed at the WSSD is ambitious in its breadth of topics and scope of activities. The United States welcomes the steps taken in the two fisheries resolutions and the oceans resolution that begin implementation of the WSSD plan.

The WSSD plan calls on the world community to establish, by 2004, a regular United Nations process for global reporting and assessment of the state of the marine environment, based on existing regional assessments. This oceans resolution responds by taking the first step: requesting the Secretary-General—in close consultation with member states and relevant United Nations programs and agencies—to present an implementing proposal to the next session of the General Assembly. The United States looks forward to consulting with the Secretariat on issues such as how to make the best use of the existing expertise of the "Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP)," the most appropriate role for the Intergovernmental Oceanographic Commission, and the convening of an intergovernmental meeting.

The WSSD plan calls on the world community to elaborate regional programs of action and improve links with strategic plans for the sustainable development of coastal and marine resources. The oceans resolution before us similarly calls upon States to develop national, regional, and international programs for halting the loss of marine biodiversity. The United States welcomes this emphasis on integrated, regional approaches to oceans issues. In this context, we would like to bring to this body's attention the "White Water to Blue Water" oceans partnership initiative currently being planned for the Caribbean.

"White Water to Blue Water" aims for an integrated approach to the management of freshwater watersheds and marine ecosystems. Its focus will be practical and results-driven. The initiative will strive to improve cooperation and capacity on the national and regional level, and to promote public-private partnerships between and among governments, international organizations, nongovernmental organizations, and the private sector. "White Water to Blue Water" begins in the Wider Caribbean Region in 2003.

We hope it might serve as a successful model for similar efforts in other regions of the world.

The oceans resolution before us today continues the practice of informal UN consultations on oceans issues. We welcome this decision, look forward to future discussions, and expect our collective experiences and ideas to continue strengthening this body's understanding and consideration of critical oceans issues. As we explore topics that may not have been foreseen twenty years ago, we expect to be able to find solutions within the applicable juridical framework.

The United States also looks forward to the collective efforts to establish an inter-agency coordination mechanism on oceans and coastal issues within the United Nations system. We support the goals that have been articulated for this mechanism—among others, transparency, effectiveness, responsiveness, inclusiveness, clarity of mandate, cooperativeness, and liaison with regional organizations—and we realize that achieving these goals will require continued effort over time.

Before closing, it seems appropriate to reference the many important areas currently being addressed by the International Maritime Organization, the IMO. From ballast water and other threats to the marine environment, to the suppression of unlawful acts against navigation, to countering the threat of terrorism, the IMO is steadily facilitating global understandings and guidelines. The United States fully endorses the calls in this oceans resolution to support various aspects of the work of the IMO.

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b. Particularly Sensitive Sea Areas

On November 13, 2002, the International Maritime Organization ("IMO"), for the first time designated a U.S. location as a Particularly Sensitive Sea Area ("PSSA"). *See* IMO docs. MEPC res.98(47), March 8, 2002 (Florida Keys), MEPC 47/20 Annex 5. The zone, known as the Florida Keys' Particularly Sensitive Sea Area, is more than 3,000 square nautical miles and is one of only five such areas in the world. The

designation is for the purpose of protecting coral from anchors, groundings and collisions from large ships.

The IMO has defined a PSSA as "an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific reasons and because it may be vulnerable to damage by international shipping activities." IMO resolution A.22/Res.927, Annex 2, para.1.2, Nov. 29, 2001. Annex 2 contains new Guidelines for the Identification and Designation of PSSAs adopted by the IMO. *See* J. Ashley Roach, Particularly Sensitive Sea Areas: Current Developments, Conference on the Stockholm Declaration and the Law of Marine Environment, May 23, 2002. Excerpts from the announcement of the Florida Keys designation by the U.S. National Oceanic and Atmospheric Administration ("NOAA") are set forth below.

The full text of the NOAA announcement is available at *www.noaanews.noaa.gov/stories/s1062.htm.*

Starting Dec. 1, ships greater than 50 meters (164 feet) in length transiting the zone will be held to internationally accepted and enforceable rules. The rules direct ship captains to avoid certain areas within the zone altogether and abide by three no-anchoring areas within the zone. All nautical charts produced worldwide will now show the Florida [Keys] Particularly Sensitive Sea Area and address these protective measures. More than 40 percent of the world's commerce passes through the Florida Straits each year. Ten large ship groundings have occurred in the zone since 1984 and coral damage by rogue anchoring by large ships or freighters has occurred 17 times since 1997.

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The waters around the Florida Keys and the Tortugas are some of the most heavily trafficked shipping areas in the world. Over the years, ships have caused damage to the coral reef ecosystem through anchoring, groundings, collisions and accidental or operational discharges of harmful substances.

To gain approval for a protected sea area, a nation must identify maritime-interest compliance measures with which the IMO can direct ships to comply. For the Florida Keys' Particularly Sensitive Sea Area these measures are four "areas to be avoided" that prevent large ships from traveling too close to the coral reef. This amendment to the northernmost area to be avoided was developed in response to comments by mariners operating in the area because of the risk of collisions that could result in devastating pollution to the reefs.

Yet another measure declares three mandatory no-anchoring areas that protect fragile reefs in the Tortugas. While protecting the fragile coral against the significant destruction that can be caused by the dragging and swinging of large anchors, this measure also takes into account the interests of shipping and commerce by continuing to allow ships to navigate through this area.

While these measures are in place domestically, adoption by the IMO means these areas will appear on international charts, thus increasing mariner awareness and compliance. For instance, although the no-anchoring zones protecting the deep reefs of the Tortugas have been in place since 1997 and appear on NOAA nautical charts, many foreign-flagged vessels travel the area and carry non-NOAA charts that do not identify this zone. Thus, while anchoring incidents have declined since 1997, NOAA continues to document violations.

c. South Pacific Regional Environment Programme Agreement

On November 7, 1997, President William J. Clinton transmitted to the Senate for advice and consent to ratification the Agreement Establishing the South Pacific Regional Environment Programme, done at Apia, June 16, 1993. S. Treaty Doc. No. 105–32 (1993). Excerpts below from the President's transmittal letter explain the importance of the United States becoming a party to the agreement.

On September 5, 2002, the Senate provided advice and consent to the agreement. 148 CONG. REC. S8,326.

The White House,
November 7, 1997.

To the Senate of the United States:

I transmit herewith, for the advice and consent of the Senate to ratification, the Agreement Establishing the South Pacific Regional Environment Programme, done at Apia on June 16, 1993 ("the Agreement"). The report of the Department of State with respect to the Agreement is attached for the information of the Senate.

The South Pacific Regional Environment Programme (SPREP) has existed for almost 15 years to promote cooperation in the South Pacific region, to protect and improve the South Pacific environment and to ensure sustainable development in that region. Prior to the Agreement, SPREP had the status of an informal institution housed within the South Pacific Commission. When this institutional arrangement began to prove inefficient, the United States and the nations of the region negotiated the Agreement to allow SPREP to become an intergovernmental organization in its own right and enhance its ability to promote cooperation among its members.

The Agreement was concluded in June 1993 and entered into force in August 1995. Nearly every nation—except the United States—that has participated in SPREP and in the negotiation of the Agreement is now party to the Agreement. As a result, SPREP now enjoys a formal institutional status that allows it to deal more effectively with the pressing environmental concerns of the region. The United States and its territories can only participate in its activities as official observers.

The Agreement improves the ability of SPREP to serve the interests of American Samoa, the Commonwealth of the Northern Mariana Islands, and Guam. Its ratification is supported by our territories and will demonstrate continued United States commitment to, and concern for, the South Pacific region.

Under its terms, the Agreement entered into force on August 31, 1995. To date, Australia, Cook Islands, Federated States of Micronesia, Fiji, France, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Papua New Guinea, Solomon Islands, Tonga, and Western Samoa have become parties to the Agreement.

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d. Marine wildlife

(1) Protocol to Amend 1949 Convention on Establishment of an Inter-American Tropical Tuna Commission

On September 5, 2002, the Senate provided advice and consent to the Protocol to Amend the 1949 Convention on the Establishment of an Inter-American Tropical Tuna Commission. 148 CONG. REC. S8,326. The Protocol was designed to allow regional economic organizations, such as the European Union, to become parties to the Convention. *See* S. Treaty Doc. No. 107–2 (2002); S. Exec. Rep. No. 107–6 (2002); *see also Digest 2000* at 306–308.

(2) 1990 Protocol Concerning Specially Protected Areas and Wildlife

On the same day, the Senate gave its advice and consent to ratification of the 1990 Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region. *See* S. Treaty Doc. No. 103–5 (1990). The Resolution of Ratification for the Protocol contained three reservations and one understanding, set forth below. 148 CONG. REC. S8,326 (Sept. 5, 2002).

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Section 2. Reservations.
The advice and consent of the Senate under section 1 is subject to the following reservations, which shall be included in the instrument of ratification.

(1) The United States of America does not consider itself bound by Article 11(1) of the Protocol to the extent that United States law permits the limited taking of flora and fauna listed in Annexes I and II—

(A) which is incidental, or
(B) for the purpose of public display, scientific research, photography for educational or commercial purposes, or rescue and rehabilitation.

(2) The United States has long supported environmental impact assessment procedures, and has actively sought to promote the adoption of such procedures throughout the world. U.S. law and policy require environmental impact assessments for major Federal actions significantly affecting the quality of the human environment. Accordingly, although the United States expects that it will, for the most part, be in compliance with Article 13, the United States does not accept an obligation under Article 13 of the Protocol to the extent that the obligations contained therein differ from the obligations of Article 12 of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region.

(3) The United States does not consider the Protocol to apply to six species of fauna and flora that do not require the protection provided by the Protocol in U.S. territory. These species are the Alabama, Florida and Georgia populations of least term (Sterna antillarum), the Audubon's shearwater (Puffinus lherminieri), the Mississippi, Louisiana and Texas population of the wood stork (Mycteria americana) and the Florida and Alabama populations of the brown pelican (Pelicanus occidentalis), which are listed on Annex II, as well as the fulvous whistling duck (Dendrocygna bicolor), and the populations of widgeon or ditch grass (Rupia maritima) located in the continental United States, which are listed on Annex III.

Section 3. Understanding.
The advice and consent of the Senate under section 1 is subject to the following understanding, which shall be included in the instrument of ratification:

The United States understands that the Protocol does not apply to non-native species, defined as species found outside of their natural geographic distribution, as a result

of deliberate or incidental human intervention. Therefore, in the United States, certain exotic species, such as the muscovy duck (Carina moschata) and the common iguana (Iguana iguana), are not covered by the obligations of the Protocol.

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(3) Dolphin-safe tuna

On December 31, 2002, the Secretary of Commerce issued a determination that the encirclement of dolphins with purse seine nets is not having a significant adverse impact on depleted dolphin stocks in the eastern Pacific Ocean. The decision is described below in excerpts from an announcement by the National Oceanic and Atmospheric Administration ("NOAA"). On the same day, a suit was filed against the Secretary of Commerce by Earth Island Institute, eight other environmental groups, and one individual in an effort to repeal the decision. That suit was pending at the end of 2002; an order issued on January 22, 2003, by the United States District Court for the Northern District of California stayed the implementation of the final finding by the Secretary of Commerce.

The full text of the announcement is available at *www.nmfs.noaa.gov/prot_res/PR2/Tuna_Dolphin/finalfinding.html.* The text of the final decision by the NOAA assistant administrator for fisheries, is available at *www.nmfs.noaa.gov/prot_res/PR2/Tuna_Dolphin/tuna_dolphin_decision.doc.*

On December 31, 2002, the National Marine Fisheries Service (NOAA Fisheries), on behalf of the Secretary of Commerce, made a finding, based on the results of required research, information obtained under the International Dolphin Conservation Program (IDCP), and any other relevant information, that the intentional deployment on or encirclement of dolphins with purse seine nets is not having a "significant adverse impact" on any depleted dolphin stock in the eastern tropical Pacific Ocean (ETP). This

finding means that the dolphin-safe labeling standard shall be that prescribed by section (h)(1) of the Dolphin Protection Consumer Information Act (DPCIA) (16 U.S.C. 1385). Therefore, dolphins can be encircled or chased, but no dolphins can be killed or seriously injured in the set in which the tuna was harvested. The finding became effective immediately and applies to tuna harvested in the ETP by purse seine vessels with carrying capacity equal to or greater than 400 short tons and sold in the United States.

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To support NOAA Fisheries' finding, the Marine Mammal Protection Act, as amended by the International Dolphin Conservation Program Act (IDCPA) (16 U.S.C. 1414) requires NOAA Fisheries, in consultation with the Marine Mammal Commission (MMC) and the Inter-American Tropical Tuna Commission (IATTC), to conduct a study of the effect of intentional encirclement (including chase) on dolphins and dolphin stocks incidentally taken in the course of purse seine fishing for yellowfin tuna in the ETP.

NOAA Fisheries completed the required research, including: population abundance surveys, a review of relevant stress-related research, a necropsy study from dolphins killed in the international tuna purse seine fishery, a review of historical demographic and biological data from the affected dolphin stocks, and a chase-recapture experiment on dolphins in the ETP. Based on the research results found in NOAA Fisheries' Final Science Report, the other best available information, NOAA Fisheries has concluded that the chase and intentional deployment on or encirclement of dolphins with purse seine nets is not having a significant adverse impact on depleted dolphin stocks in the ETP. All of NOAA Fisheries' research results underwent a rigorous, independent peer review process, consisting of a year-long series of reviews conducted by the Center for Independent Experts (CIE) at the University of Miami to ensure that the information before the Secretary was of the highest caliber.

In 1999, NOAA Fisheries submitted a Report to Congress containing the preliminary research findings to support an initial finding on the dolphin-safe label. The 1999 Report described a decision analysis framework to quantitatively evaluate the various

types of information gathered in the required studies in order to make the initial finding. The final research results provide substantial additional information to support the final finding than was available for the initial finding. To accommodate the newly available scientific information and other relevant information, and based on input received on the initial finding in 1999, NOAA Fisheries revised its decision-making process for the final finding.

The Organized Decision Process (ODP) differs from the previous decision framework primarily in that it takes into account different levels of uncertainty inherent in research of this nature. The ODP allows the Secretary to consider many different types of the information, in light of the uncertainty, and appropriately weigh the information based on the level of confidence that exists for the information. The ODP is also distinct from NOAA Fisheries' earlier decision framework in that it includes a mechanism for weighing information based on high standards for considering the best information available. To ensure transparency in its development, NOAA Fisheries published the ODP in the Federal Register as proposed and carefully considered comments from the IATTC, the MMC, environmental organizations, the U.S. and the foreign tuna industries, members of the public, the U.S. Departments of State and Justice, two members of the U.S. Congress, and several foreign nations, among others. NOAA Fisheries made revisions, as appropriate, based on these comments. On August 23, 2002, NOAA Fisheries published the final ODP in the Federal Register. The final ODP considers separate measures of fishery and environmental effects on dolphins and provides an appropriate level of guidance in considering different types of highly technical information to make a final finding that is informed, transparent, and defensible.

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(4) Cooperation in fisheries and aquaculture

On July 30, 2002, the American Institute in Taiwan ("AIT") and the Taipei Economic and Cultural Representative Office in the United States ("TECRO") entered into the Memorandum of Understanding Concerning Cooperation in

Fisheries and Aquaculture. The obligations of the MOU are to be carried out by the "designated representatives" of the two entities. Article 7 of the MOU provides that for AIT the designated representatives are "the U.S. Department of Commerce, the U.S. Coast Guard and other appropriate agencies" and for TECRO, "the [Taiwan] Council of Agriculture, the [Taiwan] Coast Guard Administration and other appropriate agencies." The MOU provides for cooperation to implement the 1995 FAO Code of Conduct for Responsible Fisheries and the International Plans of Action for the Management of Fishing Capacity, for the Conservation and Management of Sharks, for Reducing Incidental Catch of Seabirds in Longline Fisheries, and for Preventing, Deterring and Eliminating Illegal, Unreported and Unregulated Fishing, as adopted by the FAO. Key provisions of the MOU are set forth below. For a description of AIT and TECRO, *see* chapter 3.A.3.a.(2).

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

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2. TECRO provides assurances that, through its designated representatives, it shall implement fisheries conservation and management measures and regulate the activities of fishing vessels registered in the territory it represents on the basis of the 1995 U.N. Fish Stocks Agreement and, upon its entry into force, the 1993 FAO Compliance Agreement.

3. AIT provides assurances that, through its designated representatives, it will endeavor to assist the authorities of the territory represented by TECRO to participate equitably in global, regional and subregional fisheries organizations.

4. The Parties, through their designated representatives, shall seek to promote sustainable fisheries through the effective operation of global, regional and subregional fisheries management organizations and arrangements in which they both participate. For the purposes of effective cooperation between the Parties, bilateral consultations may be held prior to annual meetings

of such global, regional and subregional fisheries management organizations and arrangements.

5. The Parties, through their designated representatives, shall continue to cooperate, consistent with the laws and regulations of the territories they represent, in the implementation of UNGA Resolution 46/215, and shall also take action against individuals, corporations and vessels subject to those laws and regulations that may engage in large-scale high seas driftnet fishing operations in the North Pacific Ocean.

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4. Other Conservation Issues

a. Antarctica: Environmental Protocol Annex V

On May 24, 2002, the Government of India deposited with the Department of State, as depositary, its ratification of annex V on Area Protection and Management to the Protocol on Environmental Protection to the Antarctic Treaty. Under the terms of the Protocol, annex V entered into force as of that date. The Protocol on Environmental Protection to the Antarctic Treaty, 30 I.L.M. 1455 (1991), together with annexes I through IV (on environmental impact assessment, conservation of Antarctic fauna and flora, waste disposal and waste management and prevention of marine pollution) entered into force on January 14, 1998.

Shortly after the conclusion of negotiation of the Protocol and annexes I–IV, on October 17, 1991, annex V was adopted at the Sixteenth Meeting of the Antarctic Treaty Consultative parties, in Bonn. Annex V was transmitted by the United States to the Senate for advice and consent to ratification with the Protocol and annexes I through IV on February 18, 1992. The report of the Secretary of State submitting the instruments to the President for transmittal to the Senate described annex V as set forth below. S. Treaty Doc. No. 102–22 (1992).

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ANNEX V

AREA PROTECTION AND MANAGEMENT

Annex V is designed to simplify, improve and extend the system of protected areas that has evolved within the Antarctic Treaty consultative mechanism. It provides for the designation of two categories of protected area: Antarctic Specially Protected Areas and Antarctic Specially Managed Areas.

Any area, including any marine area, may be designated as an Antarctic Specially Protected Area to protect outstanding environmental, scientific, historic, aesthetic or wilderness values, any combination of those values, or ongoing or planned scientific research. Parties are required to seek to include within the system of Antarctic Specially Protected Areas:

> Areas kept inviolate from human interference so that future comparisons may be possible with localities that have been affected by human activities;
> Representative examples of major terrestrial, including glacial and aquatic, ecosystems and marine ecosystems;
> Areas with important or unusual assemblages of species, including colonies of breeding native birds or mammals;
> The type locality or only known habitat of any species;
> Areas of particular interest to ongoing or planned scientific research;
> Examples of outstanding geological, glaciological or geomorphological features;
> Areas of outstanding aesthetic and wilderness value;
> Sites or monuments of recognized historic value; and
> Such other areas as may be appropriate to protect the values of Antarctica enumerated above.

Detailed management plans are required for each Antarctic Specially Protected Area and entry into such areas is prohibited except in accordance with a permit issued by an appropriate authority. Permits shall specify in detail activities authorized, by whom, where and when; as well as any other conditions imposed

by the management plan. Specially Protected Areas and Sites of Special Scientific Interest designated by past Antarctic Treaty Consultative Meetings are to be redesignated as Antarctic Specially Protected Areas.

Any area, including any marine area, where activities are being conducted, may be designated as an Antarctic Specially Managed Area to assist in the planning and coordination of activities, avoid possible conflicts, improve cooperation between Parties or minimize environmental impacts. Such areas may include areas where activities pose risks of mutual interference or cumulative environmental impacts and sites or monuments of recognized historic value. Management plans are required for each Antarctic Specially Managed Area, though entry into such areas does not require a permit.

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Annex V obligates Parties to keep and exchange detailed information regarding Antarctic Specially Protected Areas, Antarctic Specially Managed Areas and historic sites and monuments, including records of permits and site visits; and calls for Parties to take steps to ensure that all those intending to visit Antarctica have clear and accurate information about the system of protected areas.

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b. U.S.-Russia Agreement on the Conservation and Management of the Alaska-Chukotka Polar Bear Population

On July 11, 2002, President George W. Bush transmitted to the Senate for advice and consent to ratification the Agreement between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population, done at Washington October 16, 2000 (the "U.S.-Russia Agreement."). Excerpts below from the letter submitting the treaty to the President by the Secretary of State and the attached article-by-article analysis describe the purpose of the treaty and its

importance to the United States. S. Treaty Doc. No. 107–10 (2002).

DEPARTMENT OF STATE,
Washington, June 5, 2002.

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 Agreement between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population done at Washington on October 16, 2000 (the "U.S.-Russia Agreement").

The U.S.-Russia Agreement is designed to afford protections to this polar bear population in addition to those provided by the multilateral Agreement on the Conservation of Polar Bears done at Oslo, November 15, 1973, (the "1973 Agreement"), an agreement to which the United States and Russia are parties. (The other parties are Norway, Canada and Denmark.) The U.S.-Russia Agreement will establish a common legal, scientific and administrative framework for the conservation and management of the Alaska-Chukotka polar bear population, which is shared by the United States and the Russian Federation. Unified and binding protection is needed to ensure that the taking of polar bears by native people in Alaska and the Chukotka region and other activities do not adversely affect this polar bear population.

The 1973 Agreement allows the taking of polar bears for subsistence purposes by native people, as does our domestic legislation—the Marine Mammal Protection Act (MMPA)—in respect to Alaska natives. The U.S.-Russia Agreement advances the 1973 Agreement in several ways. For example, it provides a definition of "sustainable harvest" that will help the United States and Russia to implement polar bear conservation measures. In addition, the U.S.-Russia Agreement establishes the "U.S.-Russia Polar Bear Commission," which would function as the bilateral

managing authority to make scientific determinations, establish harvest limits and carry out other responsibilities under the terms of the bilateral agreement. The Agreement would strengthen the capability of our countries to implement coordinated conservation measures for our shared polar bear population.

The United States would implement habitat components of the proposed U.S.-Russia Agreement through existing provisions of the Marine Mammal Protection Act and other Federal statutes. Although the U.S.-Russia Agreement is consistent with current practice, some legislative amendments and new authorities will be necessary to ensure its implementation. We are working with other interested federal agencies to identify appropriate legislation that will be submitted separately to Congress.

The proposed U.S.-Russia Agreement will enter into force 30 days after the date on which the United States and Russia have exchanged written notification through diplomatic channels that they have completed their respective domestic legal procedures necessary to bring the U.S.-Russia Agreement into force. The United States will present the U.S. instrument of ratification, but will do so only after the necessary legislation is in place. Enclosed for the information of the Senate is an article-by-article analysis of the U.S.-Russia Agreement.

The Department of Interior concurs in my recommendation that the U.S.-Russia Agreement be submitted to the Senate for advice and consent to its ratification.

* * * *

Respectfully submitted,
COLIN L. POWELL.

Article-by-Article Analysis

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Article 2

This article requires that the Parties cooperate with the goal of conserving the shared polar bear population and its habitat, and in the regulation of its use for subsistence purposes by native people.

Article 3

This article defines the geographic boundaries of the Agreement, which correspond to the areas within the jurisdictions of the United States and Russia, respectively, in which the joint polar bear population can be found. To take into account the possibility that polar bear migratory patterns may change, the Agreement allows for modification of these geographic boundaries by mutual agreement of the Parties. It is expected that such modifications would be concluded on behalf of the United States by the Department of State through an exchange of diplomatic notes.

Article 4

This article requires, *inter alia*, that the Parties make all efforts necessary to conserve polar bear habitats. For the United States, the commitments in Article 4 are already implemented through existing provisions of the Marine Mammal Protection Act and other federal statutes.

Article 5

This Article provides that any taking of polar bears from the Alaska-Chukotka population inconsistent with the terms of the Agreement or the 1973 Agreement is prohibited. Thus, the Parties would continue to apply the 1973 Agreement, and any take of polar bears from the Alaska-Chukotka population must be consistent with both agreements.

Article 6

Paragraph 1 of this article provides for taking of polar bears by native persons for subsistence purposes, but lists a number of conditions (e.g., prohibiting the taking of certain females, cuts and polar bears in dens; prohibiting the use of poisons, traps, or snares to take polar bears). Paragraph 2 provides for permissible takings of polar bears for scientific research and other purposes

such as rescue and rehabilitation, and sets forth the conditions under which polar bears may be placed on public display.

Article 7

Paragraph 1 of this Article provides that nothing in the Agreement is intended to authorize the taking of polar bears for commercial purposes. However, the article provides further that nothing in the Agreement limits the ability of native people, consistent with domestic law, to create, sell, and use traditional articles associated with native harvest of polar bears. Paragraph 2 provides that the Parties must undertake, in accordance with domestic law, measures necessary for the prevention of illegal trade in polar bears, including their parts and derivatives.

Article 8

Article 8 establishes the U.S.-Russia Polar Bear Commission (the "Commission"). The Commission is composed of two national sections, each consisting of two members appointed by the respective Party in order to provide for inclusion in each section of a representative of its native people in addition to a representative of the Party. The Article further describes the duties and procedures of the Commission. Each section will have one vote in the Commission and all decisions or recommendations are made only with the approval of both sections.

Among other duties, the Commission will promote cooperation among the Parties and the native people; facilitate scientific research on polar bears; establish a scientific working group to assist it in its tasks; collect and distribute data; develop quotas for annual sustainable harvest levels of polar bears; and participate in the examination of disagreements between native people of Alaska and Chukotka regarding subsistence use of polar bears.

Article 9

This Article provides that each Party has the right to harvest one-half of the annual taking limit of polar bears determined by the

Commission. It also allows a Party to transfer part of its share of the animal limit to the other Party with the agreement of the Commission.

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B. MEDICAL AND HEALTH ISSUES

1. HIV/AIDS: Global Fund to Fight AIDS, Tuberculosis and Malaria

On December 13, 2002, the Department of State issued a fact sheet describing the newly established Global Fund to Fight AIDS, Tuberculosis and Malaria. As explained in the excerpts set forth below, the Global Fund is an independent legal entity, established to provide resources through a new public-private partnership to combat HIV/AIDS, tuberculosis and malaria. Funding provided will be in addition to that available through existing bilateral and multilateral assistance programs. The United States is represented on the Board of Directors of the Fund by Secretary of Health and Human Services Tommy G. Thompson.

The Principles of the Global Fund and other information are available at *www.globalfundatm.org*. The fact sheet is available at *www.state.gov/r/pa/prs/ps/2002/15583pf.htm*.

The concept of a new international effort to increase coordination and mobilize additional resources to fight HIV/AIDS, tuberculosis, and malaria was first proposed at the July 2000 G-8 Summit in Okinawa. On May 11, 2001, President Bush announced a U.S. pledge of $200 million to support such a global fund, the first pledge by any government. In June 2001, at the urging of United Nations Secretary-General Annan, Secretary Powell, and many other national leaders, the UN General Assembly Special Session on HIV/AIDS unanimously endorsed the concept of a Global Fund, and by the time of their meeting in Genoa a month later, G-8 leaders had pledged $1.3 billion in support. Pledges now total

over $2.2 billion. In January 2002, the Global Fund was formed as a charitable foundation, based in Geneva. The Board held its first meeting in January 2002, and in April 2002 approved the first round of grants.

Purpose

The Fund is intended "to attract, manage, and disburse additional resources through a new public-private partnership that will make a sustainable and significant contribution to the reduction of infections, illness and death, thereby mitigating the impact caused by HIV/AIDS, tuberculosis, and malaria in countries in need, and contributing to poverty reduction as part of the development goals contained in the Millennium Declarations." The Fund is intended to complement bilateral and multilateral assistance programs already underway, without duplicating or replacing existing funds.

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Governance

The Global Fund is an independent legal entity, formed under Swiss Law as a charitable foundation. The Board of Directors acts as the ultimate decision making body. The 23-member Board is composed of both voting and non-voting members. The 18 voting members are composed of two groups: nine donors, including seven governments, a foundation representative, and a representative of the for-profit private sector; and nine recipients, including seven governments and two non-governmental organizations, one from the developing world and one from the developed world. The five non-voting members include representatives from the World Health Organization, UNAIDS, the World Bank, a representative for people living with the diseases, and a Swiss citizen, as required by Swiss law. Secretary of Health and Human Services Tommy G. Thompson is the U.S. representative on the Board. Governance procedures will evolve, and the goal is to have a flexible and innovative management

structure. The Board is planning a "Partnership Forum" every two years to gather all stakeholders, including those not presently participating on the Board, and advise the Fund, thus providing additional input and coordinating actions and efforts in the fight against the three diseases.

The Secretariat, headed by Executive Director, Dr. Richard Feachem, manages the Fund on a day-to-day basis. A Technical Review Panel (TRP) is charged with reviewing all proposals to ensure that they are scientifically, technically, and developmentally sound. The TRP is composed of an independent group of 22 experts in the three diseases, and in the fields of prevention, clinical care, health education, and health economics.

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2. Cloning

On September 23, 2002, Carolyn Willson, Legal Adviser, U.S. Mission to the United Nations, presented the views of the United States to the Sixth Committee, Fifty-seventh UN General Assembly, on agenda item 162, International Convention Against the Reproductive Cloning of Human Beings. The U.S. statement supporting a global and comprehensive ban against creation of cloned human embryos for any purpose is set forth below.

The U.S. statement and the February description of the U.S. position, The Views of the United States on the Science and Ethical Implications of Human Cloning, are available at *www.state.gov/s/l/c8183.htm.*

Last year, the General Assembly established an Ad Hoc Committee of the Legal Committee to consider the issue of Human Cloning. The Committee met in February and, after hearing the views of a panel of scientists and bioethicists, began discussion of the topic. A proposal was presented for a Convention which would prohibit the reproductive cloning of human beings. The United States took the position that a global and comprehensive ban is needed against

creation of cloned human embryos for any purpose. President Bush elaborated on this position in addressing the issue in April 2002. The President said, "I believe all human cloning is wrong, and both forms of cloning ought to be banned. Anything other than a total ban on human cloning would be unethical. Research cloning would contradict the most fundamental principle of medical ethics, that no human life should be exploited or extinguished for the benefit of another."

In view of the preliminary discussions of the Ad Hoc Committee, which indicated a divergence of views on the proposal, the proponents of the convention to ban human reproductive cloning have slightly modified their proposal. They now suggest "a step-by-step" approach to these complex bioethical issues. First, there would be a ban on reproductive cloning of human beings. This could then lead, at a later stage, to "measures concerning the regulation of other types of cloning by interested States, including through the elaboration of a separate international instrument." They argue that such an approach would make it quite clear that a Convention against the reproductive cloning of human beings should not be seen as implicitly authorizing all types of cloning.

The United States does not agree. A ban that prohibited only "reproductive" cloning but did not address "therapeutic" or "experimental" cloning would implicitly authorize the creation and destruction of human embryos for experimentation. Furthermore, a ban on reproductive cloning would be impossible to enforce in an environment that permitted therapeutic cloning in laboratories. Once cloned embryos were available, it would be virtually impossible to control what was done with them, including the implantation of a cloned human embryo and bringing that embryo to term as a new cloned human. Indeed, even in the face of a ban on reproductive cloning, the scientist could export the cloned embryos to a jurisdiction where no such ban existed.

The proponents of a convention to ban human reproductive cloning have expressed concern that an attempt to achieve a ban on all types of cloning would undermine efforts to conclude a

convention before a cloned human is produced. This view assumes that a convention could be negotiated and brought into force in a very short period. Recent conventions produced by the UN General Assembly have taken several years to enter into force. To ban "reproductive" cloning effectively, all human cloning must he banned. Under a partial ban that permitted the creation of cloned embryos for research, human embryos would be widely cloned in laboratories and assisted-reproduction facilities. Once cloned embryos were available, it would be virtually impossible to control what was done with them. Stockpiles of embryonic clones could be produced, bought and sold without anyone knowing it. Implantation of cloned embryos would take place out of sight, and even elaborate and intrusive regulations and policing would have great difficulty detecting or preventing the initiation of a clonal pregnancy. Once an illicit clonal pregnancy is begun, it would be virtually impossible to detect it. A ban only on "reproductive" cloning would therefore be a false ban, creating the illusion that such cloning had been prohibited. Furthermore, a completely effective ban would require universal acceptance to ensure that there were no safe havens for cloning activities.

It would be shortsighted to ignore the reality of this situation in the search for a solution through a step-by-step process, a process that would attempt to use two instruments, two regimes to deal with different aspects of a single problem, cloning, and which would take years to conclude. We must thwart this threat to human dignity through a total ban.

The United States, therefore, continues to support a ban on all human cloning and urges immediate action by the UN to put such a ban in place. We cannot agree to start down the road of a step-by-step process that would prohibit the production of cloned human beings but not prohibit the production of cloned human embryos for immediate destruction, an equal affront to human life and dignity.

In February the U.S. delegation presented a detailed description of the U.S. position. We would be pleased to provide copies of that paper to any delegation requesting it.

C. OTHER TRANSNATIONAL SCIENTIFIC ISSUES

Plant Genetic Resources

On November 1, 2002, Ambassador Tony Hall, U.S. Permanent Representative to the Food and Agriculture Organization of the United Nations signed the International Treaty on Plant Genetic Resources for Food and Agriculture in Rome. The U.S. statement on signing the treaty is set forth below.

On November 1, 2002, the United States signed the International Treaty on Plant Genetic Resources for Food and Agriculture (the Treaty) in Rome. In addition to representing the United States' interest both in becoming party to this important treaty and in global food security generally, U.S. signature enables the United States to best protect and represent the vital interests of U.S. agriculture and biotechnology sectors in the important matters affected by the Treaty. Prior to signing, the United States conducted extensive cross-sectoral consultations with a broad spectrum of key U.S. stakeholders. By signing, the United States signaled its strong interest in, and support of, the Treaty's primary goal: promoting global food security through the conservation and sustainable use of plant genetic resources for food and agriculture. The U.S. Department of Agriculture has a long-standing general policy of providing permitting open access to its own federal plant genebanks. The Treaty embodies the concept of facilitated access to plant genetic resources in national and certain international genebanks.

As a signatory to the Treaty, the United States will actively participate in the development of a standard material transfer agreement under the aegis of the Treaty. The benefit-sharing and intellectual property rights of this material transfer agreement will likely create a *de facto* global standard for agreements on international exchanges of plant genetic resources. The United States seeks to ensure that this agreement will be simple to administer and that it will promote, not impede, international exchanges of plant genetic resources. The decision to proceed

with U.S. ratification, however, will depend on the satisfactory resolution of outstanding issues related to benefit-sharing, intellectual property rights and financial responsibilities.

Cross References

International Whaling Commission, **Chapter 4.B.7.**
Treaty on Fisheries Between the Governments of Certain Pacific Islands States and the Government of the United States of America, **Chapter 4.B.4.**

Chapter 14

Educational and Cultural Issues

INTERNATIONAL CULTURAL PROPERTY PROTECTION

During 2002, the United States entered into a memorandum of understanding with Cyprus, 67 Fed. Reg. 47, 447 (July 19), and extended for five years a memorandum of understanding with Guatemala, 67 Fed. Reg. 61,259 (Sept. 30), and agreements with Mali and Peru, 67 Fed. Reg. 59, 159 (Sept. 20) and 67 Fed. Reg. 38,877 (June 6), respectively, to protect cultural property in those countries. The instruments were entered into at the request of the foreign country, 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. 231 (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 a complete copy of each of the instruments and the relevant Federal Register notices, are available at *http://exchanges.state.gov/education/culprop/list.html*.

Cyprus

On July 16, 2002, the United States entered into a memorandum of understanding with the Government of the Republic of Cyprus ("MOU") to protect irreplaceable archaeological objects and materials representing the Preclassical and Classical periods of Cypriot history. 67 Fed. Reg. 47, 447 (July 19, 2002). In the case of Cyprus, emergency restrictions on certain categories of Byzantine ecclesiastical and ritual ethnological material had been imposed effective April 12, 1999. Such emergency restrictions do not require the negotiation of an agreement. Excerpts from the Federal Register notice concerning the MOU are set forth below.

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During the past several years, import restrictions have been imposed on archaeological and ethnological artifacts of a number of signatory nations [parties to the 1970 UNESCO Convention]. These restrictions have been imposed as a result of requests for protection received from those nations as well as pursuant to bilateral agreements between the United States and other countries. . . .

Import restrictions are now being imposed on certain archaeological material of Cyprus representing the pre-Classical and Classical periods of its cultural heritage as the result of a bilateral [MOU] entered into between the United States and the Republic of Cyprus. This [MOU] was entered into on July 16, 2002, pursuant to the provisions of 19 U.S.C. 2602. Accordingly, Sec. 12.104g(a) of the Customs Regulations is being amended to indicate that restrictions have been imposed pursuant to the [MOU] between the United States and Cyprus. This document amends the regulations by imposing import restrictions on certain archaeological material from Cyprus as described below.

It is noted that emergency import restrictions on Byzantine Ecclesiastical and Ritual Ethnological Material from Cyprus were previously imposed and are still in effect. (See T.D. 99–35, published in the Federal Register (64 FR 17529) on April 12, 1999.) These

emergency import restrictions are separate and independent from the restrictions published in this document.

Material Encompassed in Import Restrictions

In reaching the decision to recommend protection for the cultural patrimony of Cyprus, the Associate Director for Educational and Cultural Affairs of the former United States Information Agency determined that, pursuant to the requirements of the Act, the cultural patrimony of Cyprus is in jeopardy from the pillage of archaeological materials which represent its pre-Classical and Classical heritage. Dating from approximately the 8th millennium B.C. to approximately 330 A.D., categories of restricted artifacts include ceramic vessels, sculpture, and inscriptions; stone vessels, sculpture, architectural elements, seals, amulets, inscriptions, stelae, and mosaics; metal vessels, stands sculpture, and personal objects. These materials are of cultural significance because Cypriot culture is among the oldest in the Mediterranean. While Cypriot culture derives from interactions with neighboring societies, it is uniquely Cypriotic in character and represents the history and development of the island about which important information continues to be found through in situ archaeological research.

The restrictions imposed in this document apply to objects from throughout the island of Cyprus.

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Cross References

Intangible cultural heritage, **Chapter 6.D.4.**

Chapter 15

Private International Law

A. COMMERCIAL LAW

1. Overview

On May 11, 2002, Harold S. Burman, of the Office of Private International Law in the Office of the Legal Adviser, U.S. Department of State, addressed the ABA Section of International Law and Practice ("SILP") at its 2002 spring meeting. His remarks, excerpted below, provided an overview of selected current developments in the area of private international law.

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

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Hague Conference on Private International Law:
Decisions on projects at the Hague were made at a recent April 22 meeting . . . includ[ing] the status of the judgments convention, securities intermediaries convention, international family law, and Hague conventions on service of process, taking of evidence, and legalization of documents. . . .

Final action was deferred on the judgments convention, and a new text with a more narrow scope will be prepared for consideration in the first half of 2003. The core provisions may include choice of court agreements, defendants forum, counter claims, branches, trusts and physical injury torts.

A diplomatic conference on the draft convention on law applicable to securities intermediaries was authorized for the fall of 2002, depending on progress made at regional meetings. Open issues include criteria to "locate" relevant intermediaries in an age of increasing use of dematerialized securities and accounts that can be managed from various countries by remote systems.

Secured financing and new treaty developments:
Major developments occurred since the last SILP Spring meeting in three international bodies. First, UNCITRAL [United Nations Commission on International Trade Law] completed in July 2001 the convention on accounts receivable financing, a significant step forward in upgrading commercial finance standards for most countries. The UN General Assembly approved and opened the convention for signature and ratification in December 2001. . . .

UNIDROIT [International Institute for the Unification of Private International Law] and ICAO [International Civil Aviation Organization] completed the "Cape Town" convention on mobile equipment finance, and the first protocol covering aircraft equipment in November 2001, the final text of which has just been completed in April 2002 after language adjustments and technical corrections. Stated to be the historic first commercial law convention negotiated in a major developing country (South Africa), it follows the same fundamentals as the receivables convention, but goes beyond that and has optional provisions on expedited remedies and insolvency, as well as requiring a registry system. A Preparatory Commission is meeting this week at ICAO in Montreal to initiate the first international computerized notice filing system, which will be accessible in the six official UN languages. . . .

The OAS at its Sixth Specialized Conference on Private International Law (CIDIP-VI), concluded its meetings in February 2002 by approving an Inter-American model law on secured financing, a development which can set the stage for important changes in the Americas. The model law also follows the precepts of modern commercial finance, taking into account the substantial differences that exist between Hispanic civil law traditions and current capital markets practice. An accompanying set of rules on

related electronic commerce provisions, prepared through the National Law Center for Inter-American Free Trade (NLCIFT) at Tucson, while not adopted due to time, was widely supported by participating Latin American states and is expected to be separately circulated for adoption in the near future.

UNCITRAL, following completion of the receivables convention, was authorized by the Commission to initiate work on a UN model law on secured finance, which we anticipate may reflect results comparable to that reached at the OAS this February. Consensus on those results, however, will need to be arrived at with a wider group of countries and regions at the UN, as compared to the interests reflected at CIDIP-Vl of the 34 OAS member states. The first working group meeting on the UN project. following a colloqium in Vienna in March 2002, will begin May 20 in New York. . . .

Transportation law:
The OAS at its February 2002 CIDIP-IV meeting adopted a uniform Inter-American bill of lading for overland transportation of commercial goods. This process included a comparison of practices in the Mercosur states and the Nafta states, the latter itself reflecting a wide divergency on some issues. Agreement was reached on a number of core provisions, although in some cases alternative provisions were adopted where consolidating existing practices would not have been appropriate. Precedents in the 1989 OAS Convention on road transport ware also considered. The Uniform OAS Bill of Lading reflects an upgrade based on current practices, and may be a basis on which other transportation law standards are also revised. Consideration may be given in the future to expanding this project to include inter-coastal shipping or possibly other multimodal issues for the next OAS Specialized Conference on PIL (CIDIP-VII).

UNCITRAL initiated in April 2002 its long-awaited project on a new convention on international carriage of goods. Working jointly with CMI (Comité Maritime Internationale), the convention would at a minimum cover carriage of goods by sea port-to-port, and may also cover inland shipments once issues concerning the scope are further resolved This project can potentially replace with

a uniform document the current differing international legal regimes that now may apply to such shipments, and thus materially enhance the efficiency of transportation in trade matters.

Electronic commerce:
UNCITRAL completed in July 2001 a model UN law on electronic signatures, after a contentious three year project involving the U.S. and like-minded countries who sought a minimalist, enabling set of rules which were technology neutral, and the EU and a number of other states who favored a more regulatory approach, which reflected a particular technology and related legal concepts. . . . It is hoped that, with appropriate changes, the UN model law will be used by those states who have not yet adopted legislation, and who are not inclined to follow the U.S. enabling law approach, rather than utilizing EU directives or comparable regulatory laws in some other countries as a model.

UNCITRAL has now begun work on two new treaty projects on electronic commerce. The first is to review existing multilateral, and possibly regional treaty systems, and propose amending provisions or interpretations, possibly through an omnibus protocol, that would, between participating countries inter se, amend the existing texts in order to make them more functional for an age of computer-based commerce. The second project, a draft convention on international rules for formation of E-contracts through computer based systems, was the subject of a working group in February 2002. While intended to provide rules limited to contract formation only for participating countries inter se, questions remain whether this goal can be achieved without necessarily affecting, or possibly calling for consideration of changes to, the Vienna Sales Convention (CISG). The recent difficult history of proposed amendments to UCC Article 2 (sales) and the intersection of electronic commerce may give pause to the feasibility of this approach, unless the intersection of traditional sales law and electronic commerce rules is further worked out.

International Franchising:
UNIDROIT completed in March 2002 its Model provisions for uniform disclosure rules in international franchise arrangements,

building on its earlier Guide to international franchise legal issues. It was agreed that the final text would include the caveat that completion of these rules was not intended to encourage the adoption of laws in this field, but that if deemed necessary, the carefully crafted rules would on a uniform basis promote reasonable disclosure while at the same time remain supportive of existing practices and the financial cost of undertakings that might be involved. The text is expected to be approved by the UNIDROIT Governing Council meeting this coming September.*

International Project Finance:
UNCITRAL completed at its Plenary session July 2001 its multi-year project on a guide on IPF legal issues, and initiated last September an on-going project to refine the principles into legislative guidance where feasible, starting with the critical selection process. Project finance has become an alternative means to obtain infrastructure, especially in many developing countries, drawing on private sector approaches and capital market funding, instead of direct governmental budgeting and public sector project management, and has become an important PIL front vis-a-vis the third world.

Cross-Border Insolvency reform:
An UNCITRAL Working Group has since December 2001 undertaken the drafting of principles for modern commerce supportive bankruptcy. The Group is expected to move onto legislative guidance, which may include alternative approaches depending on the policy choices made by any given country. The IMF, World Bank, ADB and others have supported this work, which builds on studies by those bodies as well as the UNCITRAL 1997 Model Law on procedural aspects of cross-border insolvency. A consolidated approach will need to be worked out between this

* Editors' Note: The Model Law was adopted by UNIDROIT in September 2002. The Secretary of State's Advisory Committee on Private International Law approved it on November 13, 2002. The text of the Model Franchise Disclosure law is available at *www.unidroit.org/english/franchising/main.htm*.

project and the parallel UNCITRAL project on secured finance, especially at the points of intersection between the effort to expand options for reorganization and refinance, and yet allow sufficient protection for secured creditors to attract investment, especially in developing countries.

Cross-border bar association initiatives:
The recent initiative by ABA leadership to explore the feasibility of law harmonization efforts between national bar associations was discussed at the ABA 2001 mid-year meeting at San Diego and at a more expanded program at Chicago in August 2001. Ongoing initiatives are being considered; it is assumed that harmonization work will take place through existing Section activities, which could include some overview functions for SILP. As one possible project, we have been requested to provide a short list of completed international PIL texts which might be proposed as starting points for work between interested bar associations.

2. Secured Transactions: Harmonization and Modernization

Harold S. Burman, of the Office of Private International Law, U.S. Department of State, addressed the 75th Anniversary Congress of the International Institute for the Unification of Private Law ("UNIDROIT") in Rome, held September 27–28, 2002, "Worldwide Harmonisation of Private Law and Regional Economic Integration". His presentation, entitled "Harmonization and Modernization of the Law Governing Secured Transactions: One Overview," is set forth below.

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

. . . [T]he concepts of harmonization, regionalism and universality have different meanings for some speakers and different implications in the various areas of international private law ("PIL") that are on the agenda of this Congress. My comments are intended to give an overview of secured transactions law as it has figured into

harmonization work over the last decade, and what that may mean for the future.

Secured finance law in recent years has been a hotbed of PIL activity. Looking backward, it can be seen as reflecting major trends due in part to globalization and in part to mere work overall in the UNIDROIT field, not only at UNIDROIT but at other international and regional bodies engaged in this activity. One needs less than a decade to illustrate this. In the mid-1990's, the accepted wisdom in the field had placed several areas in the "impossible" list, consigned to a dust bin because of deep differences in legal traditions, the uses of commercial law, and legislative and cultural difficulties in changing longstanding law. Secured finance was near the top of that list.

In modern vernacular, one can fast-forward less than ten years, and between 2001 and September 2002, the time of our Congress, two important multilateral treaties (conventions) on secured finance were concluded, a progressive regional instrument concluded, a third draft convention is due to be finalized later this year. and at least two more new secured finance law projects are under way. These include the groundbreaking 2001 Cape Town Convention on mobile equipment finance, shepherded by UNIDROIT over the years, and its Protocol on aircraft finance done jointly with the International Civil Aviation Organization (ICAO); the closely related 2001 UNCITRAL Convention on accounts receivable finance, and the 2002 Organization of American States (OAS) sponsored Inter-American Model Law on Secured Finance. Before the ink was dry, new projects in this area of law were underway at UNIDROIT and UNCITRAL. In December of this year, the Hague Conference will meet to finalize its draft convention on securities intermediaries (which is driven by the exponential growth in the use of secured interests in stocks, bonds, etc. to support cross-border collateral). All this amounts to a major shift in this PIL field in a short period of time.

Certainly this was in part driven by what is often called "globalization", a term that variously covers cross-border markets, distribution, financing and corporate activities. The advent of the computer age made access to markets possible for remote participants; this also made the status of their laws on secured

finance a front-line issue for credit risk analysis. Trade agreements, liberalization of markets, and open borders have all created the possibility of enhanced trade. The interaction of regional markets also has been a factor, and during this period substantial change has come through the European Union, Nafta, Mercosur and others. Law harmonization has now taken some root in subsaharan Africa through Ohada and several other bodies.

The other side of this coin is that a significant amount of cross-border commerce doesn't materialize because even with liberalized trade, disparities in certain areas of private law, such as secured finance, effectively block or make transactions inefficient, or fail to provide equivalent access to commercial finance. Secured finance reform has become one of the most effective tools by which countries can enhance their credit capacity for transacting parties in their territories, build their infrastructure, and engage in modern trade and commerce. That said, the path forward is still uncertain.

Secured finance is as old as pre-Roman commerce, and a fair amount of knowledge is available as to how polities in different ages sought to reduce the risk of distant parties both in transfer of goods and in the transfer of value. Some, though by no means all, of early credit enhancement systems were offshoots of fixed property law concepts, which worked adequately for many centuries. More recently, harmonization in the last century (UNIDROIT dates from 1926; some bodies such as the Pan American Union and the Hague Conference date from the late years of the 19th Century) emphasized the balancing of provisions of different major legal systems. This has worked well in our era for more settled areas of law like sales of goods, which was the process used for the elaboration of the UN Convention on Contracts for the International Sale of Goods ("CISG"), and its predecessor conventions and projects at UNIDROIT.

By the mid-1990's, however, the more traditional laws on secured financing no longer were necessarily the most economically productive, and this factor often increases for less developed legal systems and economies. This in turn led some to look beyond the established concepts of "harmonization", i.e. a type of middle ground between existing law standards, and to focus instead on economic results-based tests for appropriate commercial law

standards. We can now see that traditional harmonization of existing secured finance laws, for example, clearly does **not** work effectively if the test is the best credit enhancement.

Cross-border commercial finance in a more global economy requires some measure of harmonization, of course, but also a higher level of ex-ante predictability and at the same time lower risks, in order to bring more credit into a number of markets and to lower the costs. Commercial finance laws, unlike many other areas of private law, can be tested as to credit effect through neutral capital markets, which assess risks common to raising capital across borders. This is less necessary for internal market transactions of some more developed countries, because credit law and practice, even if restrictive, can adjust within closed systems and may not need changes to attract outside capital. The converse is, however, often true for cross-border finance, and especially so for lesser credit economies. International "credit maps" reflect the status of laws in place, and their effect is substantial. Without significant changes in existing secured finance laws, modern capital markets for many countries may remain out of reach. (I would note, in passing, that this raises issues at another level as to the purpose of commercial law, and how that fits into overall societal and political objectives, but that's a topic for another day).

Different secured finance models have been tested in international credit markets, and some produce greater credit enhancement. UNIDROIT's Cape Town Convention, UNCITRAL's accounts receivables convention, and the OAS model secured finance law have all adopted a common path; secured credit based on priority rights through publicly accessible and transparent notice filing systems. These are low cost systems, requiring little information for filing, but economically effective. While proven to be best able amongst competing systems to lower risk by resting on transparency and publicity, as I will note later it is not yet clear that such systems will become commonly used.

One of the trends one might draw from the examples above, is that each has moved to some extent away from legal concepts embedded in traditional property law. The Cape Town Convention embraces modern "asset-based" financing and the UNCITRAL Receivables Convention embraces modern finance based on

intangible rights to payment, both of which are grounded as it were in highly moveable collateral, which requires a shift in the concept of secured rights.

The latter, for example, allows present "rights" to vest in future goods not yet in existence, and future payment obligations as well. It also allows "bulk" financing, that is the bundling of payment rights which become almost fungible and without individual identification, such as might be required in ordinary property law. The mobile equipment convention in turn provides for the creation of treaty-based secured rights, not drawn from property law, which prevail over otherwise valid national rights if properly filed in a new international registry. These filings are neither examined as to adequacy or validated, and thus the registry operates not as a property type system, but simply places all financing parties on notice of possible superior priorities.

The Hague Conference may seek to go one step further: in order to determine the law applicable to intermediaries, which has become very important both for financing and systemic risk concerns, it is likely that conflict of laws rules drawn from property-based concepts of corporate record owners' rights cannot be maintained. If applicable law continues to be tied to property concepts, as through *lex res sitae* rules, it will become very problematic, as the evidence of "rights" increasingly moves through computer systems across borders rapidly, and transfers of interests to new holders takes place through tiers of modern intermediaries, i.e. third parties who "hold" these interests and can effectuate their movement between countries.

That said, we should now also look at the constraints and possible limits on this modern trend. First, the "jury is still out" as we say, as to whether a significant number of countries will shift to the more modern asset-based and receivables financing, or the newer concepts of secured rights in securities, already in place in some jurisdictions. Economic performance alone may not be sufficient to support change in civil or commercial law in some countries. While one could seek this type of economic boost by modernizing secured finance laws domestically, without embracing globalization more widely (though it may be difficult to do one very deeply without the other), the debates on the values of

globalization may nevertheless also affect decisions on adoption of modem finance laws.

The Cape Town Convention is likely to be widely successful, and that may in turn facilitate ratifications of the Receivables Convention, as well as adoption of the OAS model law and comparable laws in other regions. However, a follow-on project at UNCITRAL, which started this year to formulate general concepts of secured finance law, has shown that some basic issues are back on the table, despite many of the same countries having agreed to the Receivables Finance Convention only a year ago. This may have been predictable in that, while adopting a significant body of modern commercial law on assignments in the Convention, the critical priority provisions were all left optional in an annex. The optional priority systems mirror the spread in existing major legal systems today. By the end of next year, the direction in which UNCITRAL's work may go should become clear.

Another test will be the new UNIDROIT project on harmonizing secured interests in stocks, bonds, futures, etc. That project will need to see how far countries are willing to go to make secured rights work for highly moveable securities, including computer transfers of data representing "rights". A new concept of rights now exists, for example, in the U.S. through the Uniform Commercial Code Article 8 (which is uniform state law and not national law in the U.S.), which intentionally departs from older property law concepts in order to provide rights which can work predictably in an atmosphere of rapid transfers and increased fluidity of a number of markets. While some anticipate that the computer age will necessarily at some point move many countries away from older laws that inhibit market fluidity, that has not yet happened widely and cannot safely be predicted.

Missing perhaps from this litany of constraining factors are the non-legal impacts. The structure of secured finance has through history often had a significant effect on the types of parties that most readily can grant credit, the types of businesses that it favors, the types of property interests that gain preeminence as collateral, etc. Systems which rely essentially on fixed assets as collateral, which today is the majority of countries, have different lineups of interests whom that favors, than say those such as the U.S. which

heavily rely on moveables, both tangible and intangible. The latter approach frees up large amounts of value as available prime collateral, estimated in developing countries to be often at least 40 percent of available total value. Adopting the economically more productive secured finance systems, however, such as notice filing, also significantly spreads out the potential recipients, bringing in many more SME's (small and medium size enterprises) as well as different types of lending institutions. This also, however, may change the lineup of key players, and, possibly in a bit of understatement, is not welcomed everywhere.

Constraints from other legal disciplines may also be more evidenced in the future. For example, running side-by-side in some international bodies with secured finance law projects, is current work on business insolvency laws (also, by the way, on the "impossibility" list in the mid-1990's). Seen now by the World Bank, the IMF, the ADB and others as a keystone for enhancing investment but at the same time lessening systemic risk, new proposals for insolvency law reform have included optional legal regimes for refinancing and saving business entities where feasible. That, however, requires constraints on enforcement of pre-commencement secured rights, through stays of action and other mechanisms. The vision for many of a new international superhighway for secured rights financing may have new traffic signals in the middle of the road.

Finally, one of the last frontiers for secured finance laws may yet turn out to be the most difficult step to achieve at this point in our new millennium. The recent extension of modem secured finance laws to airspace, compatibly with the Chicago Convention of 1944 and its progeny which established the framework for international air transportation, works in the Cape Town Convention. UNIDROIT, however, is now seeking to go a few meters higher, and extend these concepts to outer space.

Outer space law, largely initiated by the UN's Outer Space Treaty system in 1967, effectively precludes application of national law in space. Time will tell whether the many legal minds UNIDROIT expects to gather next year, plus participants from the UN's Committee on the Peaceful Uses of Outer Space (UNCOPUOS), as well as the International Telecommunications

Union (ITU) and others, can create a new treaty system establishing secured interest rights that can adhere to assets in or services from space, and which can be enforced down below in national territories, in a manner which a sufficient number of countries are willing to accept and ratify. To be economically effective, however, of equal importance to ratifications is whether the standards negotiated are competitive with other risk investments in neutral capital markets. As noted earlier in these remarks, commercial finance law is thus testable.

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3. UNCITRAL Transport Convention

In a speech at Brooklyn Law School's Center for the Study of International Business Law, November 19, 2002, Mary Helen Carlson, of the Office of Private International Law, U.S. Department of State, commented on U.S. involvement in private international law negotiations. The excerpts below set forth views on the role of private and public representatives in this area and specific remarks on the ongoing negotiations of the UNCITRAL Transport Convention.

The full text of the speech is available at *www.state.gov/s/l*. Current drafts of the Transport Convention are available at *www.uncitral.org/en-index.htm*.

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The main international fora for work on private international law are the Hague Conference on Private International Law, the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private International Law (UNIDROIT) and the Organization of American States. Work in this field generally avoids projects where there are high-level governmental policy concerns, and focuses instead on projects where development of uniform law will solve real problems that have made particular international transactions difficult and uncertain.

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III. What is the USG Approach to Private International Law Projects?

It's a uniquely American approach, perhaps described by two words: participatory and pragmatic.

First, participatory:

The Secretary of State's Advisory Committee on Private International Law is the forum by which the State Department, which is the action office for private international law within the U.S. Government, obtains the requisite expertise and guidance on both the general direction the U.S. should take in its efforts, and specific positions the U.S. should pursue in specific pending projects. The Advisory Committee's membership includes representatives from all national legal organizations that have an interest in private international law, including the ABA's sections of International Law, Business Law, and Family Law, the National Conference of Commissioners on Uniform State Laws, the National Association of Attorneys General, the Judicial Conference of the U.S., the [Marine Maritime Association ("MLA")] and many others. . . . For specific pending projects, we turn to groups of experts who make up informal study groups, subgroups of the Advisory Committee. . . .

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V. UNCITRAL Transport Convention

As many of you know, the U.S. rules on liability for damage or loss to goods carried by sea are based on the 1924 so-called Hague Rules, which were incorporated into the U.S. COGSA (Carriage of Goods by Sea Act). This is a very long time ago. Most of our trading partners have adopted the 1968 Hague-Visby Rules, and a few countries use the 1978 Hamburg Rules. It is widely recognized that the result is a liability regime that is inconsistent and out-of-date. The U.S. industry has until recently been unable to reach agreement on key issues for a new COGSA; the U.S. Congress has been unwilling to proceed with any legislation without support from all major segments of the industry. Our trading partners

likewise have not wished to enter into the development of a new multilateral convention without some assurance that the U.S. will become a party.

Just over a year ago, a major step toward breaking this impasse was taken when the National Industrial Transportation League ["NITL"] (which represents U.S. exporters and importers) and the World Shipping Council ["WSC"] (which represents international liner shipping companies that serve U.S. foreign trade) announced a compromise agreement on cargo liability reform. As part of this agreement, NITL and the WSC made a commitment to support the international effort underway at the [Comité Maritime Internationale ("CMI")] and UNCITRAL. The CMI prepared for UNCITRAL at its request a draft instrument on transport law. The U.S. MLA participated actively in the CMI process and much of the MLA-prepared draft which was presented to the U.S. Congress several years ago but not enacted was included in the CMI draft. This instrument has been the subject of three weeks of discussions at UNCITRAL thus far. Two more weeks are scheduled for the spring of 2003, and another one or two weeks for the fall of 2003. While the negotiation will not be concluded by the end of 2003, we should have a good idea by that time of how some of the major issues of concern to the U.S. will be handled in the convention.

My office has held several public meetings in preparation for this negotiation. Our next public meeting is scheduled for Dec. 13. We have reached out to every sector—the shippers, carriers, intermediaries, underwriters, terminal operators, stevedores, banks, trucks and railroads. I head the U.S. delegation, which also currently includes representatives from the Maritime Administration, the Bureau of Economic Affairs in the State Department, the MLA, the WSC and NITL, and our academic advisor, Prof Michael Sturley who was the common-law drafter of the CMI text. If there is a need for representatives of other sectors of the industry to be part of the delegation for particular negotiating sessions, they will be included.

The first thing to understand about the UNCITRAL draft is that it is not limited to updating the liability rules of Hague, Hague-Visby and Hamburg. It is a comprehensive, ambitious text that

also covers electronic communication, obligations of the carrier, liability of the carrier, obligations of the shipper, transport documents, freight, liens, delivery, right of control, negotiability, rights of suit, and last but definitely not least, multimodal liability.

It can be assumed that the final text will eliminate the error-of-navigation defense, and will increase the per package liability limitations. Beyond that, there are few safe assumptions.

I will mention just three of the most important unresolved issues:

Whom can you sue under the instrument? The draft instrument would allow suits against the "performing party" which is defined as the contracting carrier and certain intermediate parties who physically handle the goods. This is narrower than the MLA proposal, but broader than the NITL/WSC proposal which would prohibit all claims (either under the instrument or otherwise) for cargo damage except those against the contractual carrier. Obviously, the issue of who is liable under the instrument is critical, and interrelated to numerous other issues.

What is the scope of the instrument? Port-to-port, door-to-door or some other formulation? Every mode of transportation is in favor of a single legal convention that would govern all legs of a multimodal journey—so long as that convention incorporates its version of the rules. And the rules for each mode are very different. Given the reality of containerized shipments that go from factory to ultimate customer without ever being unloaded or unpacked, some type of a multimodal system is very important. And yet many European countries are parties to mandatory international rail and truck liability conventions, which they are not prepared to abandon; and it's not clear that the U.S. truck and rail industry, whose support would be needed in order for this convention to become law in the U.S., would support a multimodal convention.

Freedom of contract. The draft text would allow parties to increase, but not decrease the liability of any party covered by the instrument. The U.S. position is that the instrument should permit the parties to a true "negotiated" contract to derogate from the terms of the instrument by express agreement. There was some support for our proposal, but the critical issue of how to define

the category of contracts that can derogate from the terms of the convention remains unresolved. The issue of who can opt out of the instrument is closely related to the issue of who is covered by the instrument in the first place. The current draft would exempt charter parties completely. The U.S. freedom of contract proposal, the exact wording of which is not yet final, does not propose to add an exemption for this category of negotiated contracts, but rather would apply the instrument unless the parties explicitly opted out of certain of its provisions.

4. Inter-American Specialized Conference on Private International Law

The Sixth Inter-American Specialized Conference on Private International Law ("CIDIP") met in Washington, D.C., February 4–8, 2002, convoked by the General Assembly of the Organization of American States ("OAS") at its twenty-sixth regular session in 1996. AG/RES. 1393 (XXVI-O/96). Model laws were adopted at the 2002 meeting on secured transactions and bills of lading. A third agenda item, the conflict of law issues related to transboundary pollution, was not pursued to completion. As reflected in the excerpts below from the final act of the meeting, the Model Law on Secured Transactions and the Inter-American Transport Bill of Lading, were the product of working committees chaired or co-chaired by the United States.

The final act of the Sixth Inter-American Specialized Conference on Private International Law is available at *http://www.oas.org/juridico/english/cidip_vi_intro.html*.

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. . . In its first plenary session held on February 4, 2002, the Conference adopted its agenda, unchanged from that proposed by the Permanent Council and approved by the General Assembly [AG/RES. 1613 (XXIX-O/99)]:

I. Standardized commercial documentation for international transportation, with special reference to the 1989 Inter-American Convention on Contracts for the International Carriage of Goods by Road, with the possible incorporation of an additional protocol on bills of lading.
II. International loan contracts of a private nature, in particular, the uniformity and harmonization of secured transactions law.
III. Conflict of laws on extracontractual liability, with an emphasis on competency of jurisdiction and applicable law with respect to civil international liability for transboundary pollution.

Work on these topics was begun by three working groups established at the Meeting of Experts convened at OAS headquarters in Washington D.C., from February 14–18, 2000, pursuant to the provisions of AG/RES. 1613 (XXIX-O/99) and CP/RES. 744 (1185/99). Chairs of each of these working groups were named at the Meeting of Experts, the report on which was published as REG/CIDIP-VI/doc.6/00 corr. 2.

The U.S. Chair of the working group for Topic I prepared the draft Inter-American Uniform Through Bill Of Lading For The International Carriage Of Goods By Road, CIDIP-VI/doc.5/02. The co-chairs of the working group for Topic II, the U.S. and Mexico, prepared the draft Model Inter-American Law on Secured Transactions, CIDIP-VI/doc.4/02. The Chair of the working group for Topic III, Uruguay, prepared the draft Inter-American Convention On Applicable Law and Proper International Jurisdiction In Matters Of Civil Liability For Cross-Border Pollution, CIDIP-VI/doc.8/02.

5. Electronic Commerce

In March 2002 the United States participated in a working group on electronic commerce of the United Nations Commission on International Trade Law ("UNCITRAL"). Set forth below in full are comments by the United States on Working Paper 94, which is part of the effort to review existing

treaties and propose amending provisions or interpretations in order to make them more functional in computer-based commerce.

The United States welcomes the opportunity to comment on WP.94, and supports the conclusion of the Plenary Session that the next session of the Working Group concentrate on that paper and the issues therein.

We believe that a selective examination of existing conventions will provide an understanding of the issues that can be dealt with successfully today. We agree with those that counsel that the form of any legal texts emanating from WP.94 does not have to be resolved at this stage. In order to focus our examination, our analysis draws on the requisites for some type of "omnibus protocol", which can provide either new provisions or agreed interpretations, applicable possibly to each existing instrument in a separate chapter, and which can be binding only as between states party inter se to each chapter selected.

We also concur with the views of others both at the Plenary and in other fora that, as to the current draft text on formation of contract, more time is needed to review the intersection between electronic commerce and sales and contract law generally, as well as the effect on the Vienna Sales Convention. It has been suggested that a future treaty on formation might be folded into a protocol based on WP.94.

As to work based on WP.94, while its list of conventions would appear daunting, we would suggest that the upcoming Working Group might focus on the conventions set out in the first section of WP.94, which were formulated by UNCITRAL and thus clearly within the Commission's ambit. Those conventions raise a number of issues that merit careful examination, and if substantial progress can be made on those during the next two Working Group sessions, we will have achieved quite a lot. At that point, the Working Group might then turn to conventions of other broad membership bodies, who have indicated an interest in having our Commission undertake such a task. Following that, regional texts could be selectively taken up, assuming an

appropriate balance between the regions as to the origin of the instruments.

We would thus suggest that the first task be to examine the UNCITRAL Conventions on Limitations, Sales of Goods, Negotiable Instruments ("Bills and Notes"), and Guarantees as to the compatibility of their provisions with emerging practices in electronic commerce. The Convention on Transport Terminals might also be examined in some manner as a joint effort with the new Working Group on carriage of goods. An initial examination of those conventions could illustrate the upgrades for electronic commerce that can be made, as well highlight the differences that may be necessary between them even as to the same e-com-related terms.

Initially, for example, it was considered that adopting the UNCITRAL Model law definitions and treatment of terms such as "writing" could suffice. Further exploration, however, has made clear that each convention's provisions must be seen through the litmus of the commercial practices for that particular area of commerce. The term "writing" for example as set out in the Model law may, upon examination, work appropriately for the Sales Convention. It is possible, however, that it cannot be so applied to negotiable instruments as now drafted. The viability of and possible market for electronic negotiable instruments, including delivery and presentment, as well as the appropriate level of defenses for protected holders of e-instruments, is still under consideration within the banking community.

Another aspect of negotiability under some rules is uniqueness, a term implicated by the Model Law's provision on "original". While manageable today in different ways through technology, as yet no well-developed set of commercial deployment has emerged, let alone accepted standard usages. Other examples would include the term "delivery". That term probably can be restated or interpreted so as to function well in the Sales Convention. If, however, it is extended beyond delivery of tangible goods, or documentation in support thereof, and into the arena of intangible or virtual goods, it may prove to be difficult at this stage to achieve any consensus based on practices in different commercial sectors.

These illustrations should not discourage, but encourage us to go forward, but with a realistic approach.

Consideration might also be given to a chapter setting out provisions of the 1996 UNCITRAL Model Law, and allowing states to agree to apply those rules inter se. Given that eight or more years is likely to have elapsed between that Model law and completion of a new e-com protocol, flexibility might have to be built in so as to reflect developments over that time.

Finally, we comment on the Convention on Transit of Goods for Trade with Land-locked States, because it is also included in the first group of Conventions in WP.94. The Secretariat has correctly pointed out that such conventions are essentially public law in focus, with few commercial or other private law aspects. That said, the Working Group at a later time may want to consider whether some of those may benefit from draft provisions which would support use of electronic data to facilitate their objectives, and which could be provided as a resource to the originating international bodies, subject, as above, to an examination of the practices involved in each area covered by those treaty systems.

6. Enforcement of Foreign Tax Claims in U. S. Courts

On November 4, 2002, the U.S. Supreme Court denied a petition for a writ of certiorari in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 123 S.Ct. 513 (Mem.) (2002). The suit, brought by the Attorney General of Canada in the Northern District of New York, alleged that named U.S. and Canadian tobacco companies had violated the Racketeer Influenced and Corrupt Organizations Act, ("RICO"), 18 U.S.C. § 1961–1968, by engaging in a scheme to smuggle cigarettes across the U.S.-Canada border in order to avoid the payment of Canadian taxes. The district court had dismissed the complaint, holding that Canada's lost revenue claims were barred by the "revenue rule," a common-law doctrine under which a U.S. court will not enforce a foreign country's tax claims. The court also found that a government's claim for damages based on increased law enforcement and related costs does not satisfy RICO's requirement that the plaintiff suffer an injury to its commercial

interests and that RICO does not provide for the disgorgement and other equitable relief requested by Canada. *Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134 (N.D.N.Y. 2000). The court of appeals affirmed. 268 F.3d 103 (2d Cir. 2001).

In October the United States had filed a brief as *amicus curiae* opposing plaintiffs' petition to the Supreme Court for a writ of certiorari. The U.S. brief argued, among other things, that certiorari was inappropriate because there was no disagreement among the circuits, since no other U.S. circuit court had reached the issues. The excerpts below from the U.S. brief provide a summary of the court of appeals decision, including the importance of the executive branch decision to limit cooperation in tax enforcement matters through a bilateral tax treaty with Canada in the Revised Protocol Amending the Convention With Respect to Taxes on Income and on Capital of September 26, 1980, Mar. 17, 1995, U.S.-Canada, art. 15, S. Treaty Doc. No. 104–4 (entered into force Nov. 9, 1995) ("1995 Tax Protocol"). Also included are excerpts from the U.S. government's discussion of the balance between civil and criminal remedies in combating international smuggling. Cross-references to other filings in the case have been deleted.

The brief is available at *www.usdoj.gov/osg/briefs/2002/2pet/6invit/2001-1317.pet.ami.inv.html*.

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The court [of appeals] explained that the "revenue rule is a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns," and is justified by "respect for sovereignty, concern for judicial role and competence, and separation of powers." . . . In particular, "[w]hen a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues and disputes of foreign relations policy that are assigned to-and better handled by-the political branches of government.". . .

The court of appeals also noted that the United States has entered into treaties with foreign governments that have carefully limited the circumstances under which foreign governments may invoke the assistance of United States courts to enforce foreign tax liability. Against that background, the court of appeals explained, "courts must be wary of intruding in a way that undermines carefully conceived and negotiated policy choices.". . . . The court of appeals found it particularly significant that a treaty between the United States and Canada bars assistance for claims against citizens of the host country, permits each party to determine whether a particular tax liability should be enforced, and requires the party requesting assistance to certify that the revenue claim has been finally determined. . . . Because the [1995 Tax Protocol] "specifically exclude[s] the type of assistance Canada seeks in this case," the court concluded, permitting petitioner's claim to go forward would "ignor[e] and undermin[e] the treaty negotiation process and the clearly expressed views of the political branches of the United States."

. . . The court of appeals rejected petitioner's contention that the revenue rule is inapplicable because petitioner filed suit under RICO, and not under Canadian tax law. The court noted that under established principles of statutory construction, federal statutes are interpreted to preserve well-established common law rules except when a statutory purpose to the contrary is evident. . . . Applying that principle, the court found "no language in RICO or in its legislative history that demonstrates any intent by Congress to abrogate the revenue rule.". . . . The court also rejected petitioner's characterization of its claim as one arising "solely" under United States law, concluding that "[o]n the contrary, Canada seeks to use the United States law to enforce, both directly and indirectly, its tax laws.". . . . The court reasoned that because petitioner seeks through its RICO claim to "have a United States court require [respondents] to reimburse Canada for its unpaid taxes, plus a significant penalty due to RICO's treble damages provision, * * * Canada's object is clearly to recover allegedly unpaid taxes.". . . . The court viewed petitioner's claim for law enforcement costs as "an indirect attempt to have a United States court enforce Canadian revenue laws," ibid., because

"[t]he primary purpose identified by Canada for using its police forces to stop smuggling was to enforce its customs and excise taxes.". . . .

The court of appeals distinguished prior circuit precedent holding that the revenue rule does not apply to criminal prosecutions by the United States of schemes to defraud a foreign nation of taxes. . . . The court explained that because such criminal prosecutions are brought to serve the interest of the United States, and are subject to Executive Branch oversight, "the foreign relations interests of the United States may be accommodated throughout the litigation." . . . "In contrast," the court observed, "a civil RICO case brought to recover tax revenues by a foreign sovereign to further its own interests, may be, but is not necessarily, consistent with the policies and interests of the United States." . . .

* * * *

Petitioner contends that review is warranted in this case, even absent [a conflict among U.S. circuit courts of appeals], because the court of appeals' decision undermines efforts to combat international smuggling and implicates the rights of a foreign sovereign. Collaboration between the United States and Canada to deter and punish such smuggling is unquestionably an important objective. But the court of appeals expressly reaffirmed its holdings in prior cases that the revenue rule does not bar a criminal prosecution by the United States of conduct that is designed to defraud a foreign country of tax revenue. . . . (reaffirming United States v. Trapilo, 130 F.3d 547, 549 (2d Cir. 1997), cert. denied, 525 U.S. 812 (1998); United States v. Pierce, 224 F.3d 158 (2d Cir. 2000)). Such prosecutions do not implicate the revenue rule because that rule applies only when the plaintiff is a foreign government or someone acting on its behalf, and the plaintiff is seeking to vindicate a foreign government's interest in collecting taxes. See Re Reid, [1970] 17 D.L.R. (3d) 199, 205 (B.C. Ct. App.) (noting that in all the cases where the revenue rule had been invoked "the foreign State was * * * the plaintiff, the claimant or the instigator of the proceedings"); Peter Buchanan Ltd., [1955] A.C. at 527 (critical fact was "that right is being enforced at the instigation of a foreign authority").

The distinction between a criminal prosecution brought by the United States and a civil action for the recovery of tax revenue brought by a foreign sovereign is critical, and it precisely aligns with the policies underlying the revenue rule. As the court of appeals explained, criminal prosecutions vindicate the interests of the United States, and they are subject to Executive Branch control. In contrast, a foreign sovereign brings a civil RICO action to further its own interest in collecting taxes, and that interest is not in all circumstances necessarily consistent with the interests of the United States.

Because the United States retains authority to prosecute international smugglers, the court of appeals' decision leaves intact a powerful means to deter and punish such conduct. At the same time, it properly reserves the decision whether to address, in a judicial forum, schemes involving foreign tax laws in the hands of the Executive Branch of our own government. Canada, for its part, has means to vindicate its interest in attacking international smuggling operations by filing suit to enforce its laws in Canadian courts and by requesting cooperation from the United States under mutual assistance treaties. A decision to authorize further judicial steps, such as treble damages actions against United States citizens, should await a clearer statement in a treaty or in legislation. The correct application of the revenue rule in this case does not call for this Court's intervention.

B. FAMILY LAW

International Recovery of Child Support and Other Forms of Family Maintenance

a. Reciprocating countries for enforcement of family support obligations

During 2002 two countries (the Netherlands and Norway) and three Canadian provinces (Alberta, Newfoundland/Labrador, and Ontario) were added to the list of countries and provinces designated as "foreign reciprocating countries" for the purpose of the enforcement of family support

obligations. 67 Fed. Reg. 71,605 (Dec. 2, 2002). Pursuant to 42 U.S.C. § 659A, the Secretary of State, with the concurrence of the Secretary of Health and Human Services, is authorized to declare foreign countries or their political subdivisions to be reciprocating countries for the purpose of the enforcement of family support obligations if the country has established or has undertaken to establish procedures for the establishment and enforcement of duties of support for residents of the United States. The procedures must be in substantial conformity with the standards set forth in the statute. *See* discussion in *Digest 2001* at 49–51.

b. Hague Conference negotiation of new child support convention

The United States provided written responses to a questionnaire from the Hague Conference on Private International Law concerning a new global instrument on the international recovery of child support and other forms of family maintenance. The questionnaire was divided into three parts. Part I elicited information concerning practice under certain existing international instruments, including the New York Convention on the Recovery Abroad of Maintenance, June 20, 1956; the Hague Conventions on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, October 24, 1956 and October 2, 1973; and the Hague Conventions on the Law Applicable to Maintenance Obligations, October 24, 1956 and October 2, 1973. The United States is not a party to any of these conventions. Nevertheless, its response provided information on U.S. practice in relevant areas and answered specific questions on U.S. reluctance to become a party to the conventions. Part II requested information concerning national systems of maintenance obligations in respect of children and other family members. The U.S. response included extensive information on U.S. procedures in these areas. The excerpts below set forth the views of the United States on part III of the questionnaire,

concerning the elements to be included in a new instrument in this area. The negotiation of the new instrument will begin with the May 5–16, 2003 Hague Conference Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance.

The full text of the U.S. response is available on the Hague Conference website at *www.hcch.net/e/workprog/maint.html.*

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PART III: QUESTIONS CONCERNING THE ELEMENTS TO BE INCLUDED IN THE NEW INSTRUMENT

31. Please list any shortcomings in the current processes for the obtaining or recovery abroad of child support or other forms of family maintenance by persons resident in your country which might be improved or remedied in the new instrument

The following are issues (not necessarily in order of importance) that we hope the new instrument will address:

a. Multiple decisions: Difficulties arise when the Requested State varies a decision of the Requesting State at the request of the debtor (usually by reducing the payment amount or abolishing arrears) without requiring the debtor to first seek variation in the Requesting State. In such cases, the Requesting State's original decision continues to be the controlling decision in that State, which results in two conflicting decisions. The new instrument should develop clear rules on variance, for both prospective and retroactive payments.

b. Assistance for debtors in variance cases: In the United States, the state child support enforcement agencies provide assistance to debtors as well as creditors. Some countries do not provide administrative assistance to debtors who have encountered substantial changes in their financial circumstances and who seek variation of a child support decision. Therefore, debtors often seek variation *sua sponte*, or invest valuable resources to hire

private counsel to get decisions of the Requesting State varied in the Requested State. If the Requested State assisted debtors in gathering information for a variation request and transmitting it to the Requesting State, this would go a long way toward resolving the variation problem discussed above.

c. The "black hole" syndrome: Requesting State requests simply disappear once they have been received by the Requested State, as if they have been swallowed up by a "black hole." Nothing happens, and months or years go by with no payments being made to the applicant in the Requesting State. There are many reasons for this: child support workers in the Requested State do not handle many international cases, and are unsure of what to do with them; the incoming international request looks different—it is not in the same form as domestic cases; and needed information is missing and the process to get it from the Requesting State is confusing and time-consuming. An important way to address this problem is for the instrument to provide for a strong Central Authority, for effective cooperation among Central Authorities, and for monitoring how the new instrument is being implemented. Another important part of the solution to this particular problem is the development of comprehensive, uniform forms to be used in providing information in international cases. The instrument needs to recognize the importance of uniform forms, without establishing rigid requirements that will be difficult to adjust. The problems with getting necessary case information discussed in this paragraph exist with incoming cases as well. For further discussion, please see our responses to question 32.

d. Cost of Services: The U.S. state child support enforcement agencies provide legal, administrative, technical and other services (including paternity testing) at no cost to a resident of a foreign reciprocating country. In some countries, foreign applicants must pay for some of these services. The greater the cost to the resident of the Requesting Party of pursuing a child support action in a foreign country, the less effective the instrument will be.

e. Establishment of Paternity and Maintenance Decisions: The vast majority of requests from U.S. states to foreign countries are for the recognition and enforcement of a U.S. decision, i.e., paternity has been established and a decision entered in a U.S.

tribunal. But occasionally a U.S. state will ask a foreign country to establish paternity and enter an initial child support decision. Some states are not able to do either of these things, leaving the U.S. applicant faced with having to go to the foreign country, hire private counsel, and initiate litigation there.

f. Limited Service Requests: In some cases, the Requesting State can exercise jurisdiction over a debtor residing in the Requested State, and, therefore, may enter its own child support decision. In those cases, it would be helpful if the Requested State would provide limited services, such as collection of DNA samples, location of persons or assets, or assistance with service of process, to the Requesting State, instead of establishing a foreign decision. The instrument should provide for such limited service requests.

g. Translation expenses: The Requesting State is usually required to submit all documentation in the language of the Requested State. Court or administrative decisions dealing with maintenance often address many other subjects as well (e.g., custody, access or divorce). In addition, even the portion of the decision that deals with maintenance may contain a lengthy recitation of background facts, income, and expenses. All of this information results in expensive and often unnecessary translation costs. The negotiators of the new instrument should consider how to reduce these unnecessary costs. Perhaps the instrument could provide that, so long as a certified copy of the entire original decision in its original language is provided, only the maintenance portion of a decision needs to be translated, or that a translated abstract is sufficient.

32. Please list any shortcomings in the current processes by which a foreign applicant seeks to obtain or recover child support or other forms of family maintenance from a person resident in your jurisdiction which might be improved or remedied in the new instrument

Many of the following problems affect outgoing as well as incoming cases.

a. Electronic Communication of Case Information: There are serious problems with getting and updating all needed case

information in a low-cost, efficient, and timely manner. Case information correspondence by surface or air mail is time-consuming, expensive, and difficult to automate. We need to consider how the new instrument can take advantage of developments in electronic communication. Perhaps the instrument could provide that most information could be transmitted electronically, and only a few key documents must be transmitted by surface or air mail.

Informal case update information, for example, should certainly be acceptable when transmitted electronically. The negotiators should also consider which of the official documentation required to process a request (completed forms, petitions, testimony, decisions, orders and other official court or administrative documents; payment records; birth and marriage certificates; photographs; etc.) might be transmitted electronically and used in official proceedings in the Requested State.

b. Electronic funds transfer: The problems related to sending case correspondence by surface or airmail of course also apply to collections and disbursements. Currency conversion costs diminish the collection amount because banks charge significant fees and convert at less-than-favorable exchange rates when dealing with relatively small, non-commercial amounts of foreign currency. The negotiators should consider how the instrument can facilitate the use of technology (electronic funds transfer/electronic data interchange or direct deposit to banking correspondents) so that payments can be processed at minimal cost and favorable exchange rates.

It would be useful for the negotiators or the Permanent Bureau to study how other instruments/transactions handle electronic communications and electronic funds transfer.

c. Updated point-of-contact information: Often much time is wasted simply finding out who is the person in the foreign country currently responsible for a particular case. There should be a provision in the instrument to encourage/require routine, timely updates of this information for every case.

d. Timely responses to requests for information: There should be some provision in the instrument to encourage/require responses to inquiries within a specified period of time.

33. Bearing in mind that the new instrument is to be "comprehensive in nature, building on the best features of the existing Conventions", and that the precise structure of the new instrument has yet to be determined, please indicate any preliminary views you have on the key elements to be addressed in the new instrument. In doing so, you may find it helpful to use the following list and to indicate what degree of importance, if any, you attach to each of the items listed

Preliminarily, the United States notes that the above reference to existing Conventions must be read in conjunction with the additional recommendation that the new instrument "be structured to combine the maximum efficiency with the flexibility necessary to achieve widespread ratification." While it may make sense for the new instrument to incorporate and build on the features of existing Conventions that have worked well in practice, features that have proved ineffective, inefficient or that have prevented widespread ratification should be discarded and replaced with new approaches.

a. provisions concerning administrative co-operation;

This is an essential feature. We have learned from our bilateral child support efforts and from our experience in other public and private international law efforts, that the adoption by a large number of countries of a treaty that sets forth a comprehensive set of standards and obligations for the establishment and enforcement of maintenance is only the first step. The treaty is only a success if it works in practice. As stated previously, the Conference should focus on the goal of getting child support payments to needy children in international cases.

This instrument must ensure that parties establish strong, effective Central Authorities and other related authorities at every step in the process. Parties should provide assistance to each other (including limited service requests and judicial assistance, where appropriate) and to debtors and creditors; they should provide

points of contact in every case who can respond to inquiries in a timely manner. Negotiators should consider whether the instrument should provide mechanisms for training to help countries carry out their obligations, and for monitoring parties' implementation efforts.

b. provisions for the recognition and enforcement of foreign decisions;

This is a key element of the new instrument. The recognition and enforcement of foreign decisions eliminates the necessity of re-litigating the same issues between the same parties in a maintenance case and the creation of conflicting, multiple decisions. Therefore, the United States supports an instrument that will provide for the recognition and enforcement of decisions from the Requesting State to the greatest extent possible.

The United States is convinced that a flexible, practical approach to recognition and enforcement is the only one that will work in the new instrument. Rather than imposing direct or indirect jurisdictional rules in the instrument, the instrument should provide that the Requested State must recognize and enforce the Requesting Party's decision if that decision was made under factual circumstances meeting the jurisdictional/due process standards of the Requested State. Adoption of this approach in the new instrument would avoid a prolonged and futile effort to develop uniform jurisdictional standards. Experience has shown that this is difficult if not impossible to achieve: a country will not join an instrument that is incompatible with its jurisdictional standards. Thankfully, it is not necessary to tackle the issue of jurisdiction in order to achieve our goal, which is an instrument that will get child support to needy children in a predictable, consistent, efficient, low-cost and timely manner.

Most child support decisions from a Requesting Party will meet the jurisdictional standards of the Requested Party. Even if the jurisdictional basis cited by the Requesting Party is not acceptable to the Requested Party, the facts of the case will probably provide another jurisdictional basis which would be acceptable to that Party. In the few cases where the Requested

Party is unable to recognize the decision of the Requesting Party, the instrument should provide that the Requested Party will take steps to obtain a new decision under its own law.

Variation of orders is closely related to the issue of recognition and enforcement of orders. There are wide differences among the countries of the world in the determination and calculation of the level of maintenance payments. The new instrument will not succeed if it permits the Requested Party routinely to modify the Requesting Party's decisions, using the Requested Party's guidelines. On the other hand, maintenance decisions need to be modified from time to time, and the instrument must provide for this.

The instrument should do everything possible to facilitate and encourage variation by the Requesting State (i.e., the variation should be done by the party that entered the initial decision). For example, the instrument could require the Requested State to provide administrative assistance to debtors, so that it would be easier for the debtor to transmit a variation request to the Requesting State; it could require Requesting States to have procedures for the prompt review and adjustment of decisions on the petition of either resident or non-resident creditors or debtors; and the instrument should provide that the physical presence of the creditor or the debtor is not required in maintenance proceedings, including variation proceedings.

The instrument should limit the circumstances under which the Requested State is permitted to vary an order (e.g., when no interested party any longer has a connection to the Requesting State, or when the creditor has consented to the jurisdiction of the Requested State).

The instrument should consider the treatment of arrearages in connection with variation of orders. A Requested State should not be permitted to reduce or eliminate arrears, even if it agrees to enforce the Requesting State's decision with respect to prospective amounts. Additionally, if the Requested State cannot recognize and enforce the Requesting State's order, and must establish a new order, the new order should include payments not only for periods after entry of the new order but also for accrued arrearages. The failure of a foreign state to recognize arrearages accrued in

the United States creates problems with U.S. decisions because, under U.S. law, arrears that have accrued under a court order are considered "final judgments" and cannot be retroactively modified by a court.

Finally, when a decision is modified by the Requested State, as permitted under the instrument, the instrument should clarify the effect on the initial order. Ideally, there should be only one controlling order at any one time.

c. applicable law principles;

The law of the forum should apply, including its choice of law provisions. Any other option would be unworkable, given that this is intended to be a worldwide, and not just a regional, instrument. Insisting that lawyers and litigants analyze and argue foreign law, and that courts make decisions based on foreign law, would be an enormous burden, could be so costly as to effectively eliminate a litigant's rights, and would probably result in decisions based on incorrect application of the foreign law.

d. uniform direct rules of jurisdiction applying to the determination and modification of decisions in respect of maintenance;

The United States strongly believes that the new instrument should avoid addressing direct or indirect rules of jurisdiction for the reasons explained in our answer in paragraph 33b. It is not necessary to establish jurisdictional rules in order to achieve the practical, concrete goals of the convention; discussion of jurisdiction will use up enormous amounts of scarce time and will distract the negotiators from the core issues which the convention must address if it is to be of use, such as administrative cooperation and enforcement of decisions; and experience has shown that any attempt to establish direct or indirect rules of jurisdiction will almost certainly fail and will jeopardize the wide acceptance of the instrument, which is a key to the success of the entire project.

e. provisions specifying the assistance to be provided to an applicant from another Contracting Party;

It would be useful to list the types of assistance that are contemplated by the instrument, so as to avoid the problem that exists under current instruments where different countries have different understandings of what sort of assistance is required. The instrument should explicitly state which types of assistance must be provided by all parties, and which are permissive. Some of the types of assistance that should be addressed are:

- Recovery of maintenance, either by enforcement of the Requesting State's decision or by the establishment of a new decision
- Collection and distribution of payments
- Assistance to the debtor by the Requested State in gathering new information and transmitting it to the Requesting State for review and possible variation of the Requesting State's decision
- Timely review by the Requesting State of requests for variation from the debtor
- Location of persons and assets
  - Assistance with service of process
  - Help with obtaining DNA samples
  - Establishment of parentage

f. provisions concerning legal aid and assistance to be provided to an applicant from another Contracting Party;

Through its bilateral efforts, the United States has learned that "legal aid," "administrative aid," and "technical assistance" can all mean different things in different countries. First and foremost, the new instrument must reflect a common and explicit understanding of the meaning of these terms. For example, one country may say that it cannot provide free legal assistance; however, it may be that petitioners in that country rarely need legal assistance,

because the administrative assistance freely provided by the relevant agency is so extensive. Once the terminology is clarified, there will still be differences in the nature and extent of no-cost assistance that countries provide, but it may not be as great as one might suspect.

The United States strongly believes that the provision of no-cost services not only results in more money reaching more needy children but also saves the government and the taxpayer money, as fewer families need to rely on cash assistance from the government. Thus, the United States has made a policy decision that state child support enforcement agencies should provide all services related to the recovery of maintenance free of charge to foreign reciprocating countries and their residents. Therefore, we urge that the instrument require a Requested State to provide no-cost services to residents of a Requesting State.

g. provisions concerning co-operation in the establishment of paternity where necessary for child support enforcement;

Provisions concerning paternity establishment are definitely important. The United States is aware that a number of countries do not currently provide this service for foreign applicants. The new instrument should seek to avoid situations where no country will exercise jurisdiction to establish a child support decision, as illustrated in the following hypothetical. Suppose that a mother and child reside in Texas and the father resides in a foreign country. The father has never been in the United States, and has taken no action, such as encouraging the mother to go to the United States or sending support to the mother in the United States, that would give Texas personal jurisdiction over the father under U.S. law. (The fact that Texas is the residence of the mother and child is not, in and of itself, sufficient under U.S. law to confer jurisdiction over the father in a Texas court). Because Texas cannot establish paternity or enter a child support decision, the mother petitions the foreign country where the father resides. In our experience, the foreign country may refuse the mother's request because it considers Texas the appropriate forum. This is because the laws of many foreign countries accept the residence of the mother and

child in a country as a sufficient basis for its tribunals to exercise jurisdiction over the father. Thus, the mother is left with no remedy.

Further, in its bilateral discussions, the United States has learned that the methodology and costs of paternity establishment vary widely from country to country. It would be useful during the negotiation process to arrange for a workshop on this issue, with presentations by technical experts, among others.

h. provisions concerning co-operation in the international transfer of funds at low cost;

The negotiators must address the importance of utilizing the most expedient, cost-effective technologies available to recover maintenance and remit collections to the creditor. Currency transfer and conversion fees combine to constitute the second highest cost of recovering international maintenance. (Only translation costs are higher.) It would be useful during the negotiation process to have a workshop on this issue so that experts can explain the problems, as well as the solutions offered by technology. Once there is a greater understanding of the issue, it should be easier to determine how to treat it in the instrument.

i. provisions enabling Contracting Parties to avoid providing services to applicants from abroad where they are not available on a reciprocal basis;

The instrument must contain certain core obligations that every party must undertake. It would be extremely useful, however, to expand the scope of the instrument beyond those core obligations to cover other services that some parties may not be in a position to provide at the present time. If the instrument does include such "optional" services, there should, of course, be no obligation for any Contracting Party to provide such services to a country that does not reciprocate. On the other hand, the instrument should permit any country that wishes to provide services on a non-reciprocal basis to do so. How best to accomplish these objectives in the instrument needs to be carefully considered. Should each Contracting Party be required to indicate which services it will

provide, with all Parties that state that they provide a particular service being automatically obligated to provide that service to each other? Or should each Contracting Party decide for itself (on a country-by-country basis or a case-by-case basis) whether it wishes to undertake an obligation to provide a particular service for a particular country?

j. standard forms;

Effective implementation of an international maintenance arrangement requires standardized forms and procedures. Bilingual forms save time and money by eliminating many of the translation requirements that would be needed to send an international request. Tribunals gain confidence in the reliability of the information provided on standard forms they have seen before. It is probably not feasible or desirable to include the precise forms in the binding international agreement, given that they will need to be in so many languages and will need to be modified from time to time.

The instrument should, however, provide for a mechanism for the development and periodic modification of forms. Even before the instrument is completed and a permanent mechanism for handling forms is established, the negotiators should consider establishing a Forms Working Group to decide which forms are most important and develop drafts of these. The Forms Group established at the 1999 Special Commission on Maintenance created a draft Transmittal that could be used as a starting point. That group also recommended the use of a separate "stand alone" Location of Persons & Assets Information Form. A Uniform International Petition or Application for filing in Tribunals may also be useful for many countries. At the program level, workers must be provided practical training in the use of these forms and a clear understanding of the procedures required to send cases to every member State.

k. provisions aimed at securing compliance with obligations under the instrument;

As noted elsewhere in the U.S. response, experience has proven that the adoption of an international instrument establishing

standards and procedures that all countries agree are wise is only the first step. The success of the convention depends on its full implementation by all Parties. Therefore, the instrument and the Hague Conference must do everything possible to facilitate compliance. The instrument's obligations should be very clear in order to avoid inconsistent interpretation.

Other possible ways to facilitate compliance include:

— Each party could be encouraged/required to provide the Hague Conference/other Parties in writing with the procedures to be followed in sending requests to the Central Authority;
— There could be a mechanism for coordinating the dissemination of forms and procedures among Parties;
— The instrument could provide for a mechanism to monitor/evaluate implementation. This might involve asking/requiring Parties to periodically provide information, statistics, etc.;
— The Hague Conference, member states and non-governmental organizations could organize training sessions and workshops, perhaps on a regional basis, where countries can exchange best practices.

l. provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor;

The instrument should clearly provide for public bodies that have provided benefits to maintenance creditors to petition under the instrument for the recovery of maintenance, including maintenance owed for a prior period. Public bodies are only entitled to recover *maintenance owed by the debtor* for the prior period. While the public body may have an assignment of maintenance for reimbursement purposes, the reimbursement sought should not exceed the maintenance amount that was owed by the debtor but not paid.

m. others.

— Relationship with the 1980 Hague Convention on International Child Abduction: It will 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. Therefore, the instrument should not apply if the Requested State makes or recognizes a judicial finding that the person seeking the recovery of maintenance has wrongfully removed or retained the child for whom maintenance is sought in the territory of the Requesting State.

— Use of cooperation and enforcement mechanisms by private attorneys: While the new instrument will be drafted so as to establish rights and obligations between governments, maintenance creditors in the United States sometimes retain private attorneys to pursue their maintenance claims, rather than going through the state child support enforcement agency. The new instrument should provide that its enforcement and cooperation mechanisms are, to the extent appropriate, available to private counsel.

34. With regard to the overall structure of the new instrument, and bearing in mind that the new instrument should "combine the maximum efficiency with the flexibility necessary to achieve widespread ratification",

a. which of the elements that you have mentioned under 33 should be included as core elements in the sense that all Contracting Parties should without exception be bound to comply with them?

The answer to this question involves balancing two competing considerations. The first is how important a particular element is to the goal of obtaining support for the greatest number of needy children. There are some elements that are so important that one would question the utility of an instrument that did not include them as mandatory for all parties. The second is whether most countries would be willing to include a particular element as mandatory. The United States preliminary view is that the following elements should be included as mandatory obligations.

— Recognition and enforcement of foreign decisions for the recovery of maintenance for minor children, including procedures for collection and distribution of maintenance payments;
— Establishment of a maintenance decision (including the determination of paternity if necessary) by the Requested State if it is unable to recognize a decision of the Requesting State;
— Rules regarding variance based on the principle that, as a general rule, decisions should be varied by the tribunal that originally made them;
— Administrative cooperation;
— Cost-free administrative services provided to debtors and creditors without travel requirements;
— Any necessary legal services provided cost-free without travel requirements;
— Central Authorities;
— Limited services for location of persons/assets and collection of DNA samples;
— Requirement of timely response to requests/inquiries from other States;
— Provision that public bodies may recover maintenance;
— Provision for the recovery of maintenance for prior periods, especially where the arrearages are due pursuant to a support order enforceable in the Requesting State;
— Provisions to monitor/facilitate compliance with obligations under the instrument;
— An instrument that includes core elements and optional elements, and permits parties to agree to the optional elements only on a reciprocal basis.

b. which of those elements should be optional, in the sense that Contracting Parties would have the freedom to opt in or opt out of them?

— Maintenance for spouses and collateral relatives;
— Use of abstracts of tribunal orders or requiring translation of only the maintenance recital;

— assistance with service of process;
— standard forms (highly desirable, but implementation of the convention should not be delayed by difficulties in developing agreed forms);
— transfer-of-funds provisions (highly desirable, but implementation of the agreement should not be delayed by difficulties in streamlining the transfer of funds).

As noted elsewhere, the United States does not favor the inclusion of either jurisdiction or applicable law provisions.

c. do you favour a general principle that, where recognition of an existing decision is not possible in the country where the debtor resides, the authorities of that country should be under an obligation to provide assistance to the creditor in obtaining a new decision?

Yes.

35. In the case of states which have entered into bilateral or regional arrangements, please indicate which elements within those arrangements you would wish to see replicated or reflected in the new global instrument

As explained elsewhere in this answer in more detail, the United States believes that the following elements would make for the strongest global instrument: Each party should be able to establish/recognize and enforce child support decisions for residents of other parties, including the establishment of paternity and the collection and distribution of payments. If a party is unable to recognize a decision of another party, then it should take all necessary steps to establish a new decision. Each party should provide these services to residents of other parties at no cost. Each party should designate a Central Authority to facilitate implementation of the Convention.

C. INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES

This section addresses cases on selected topics in this area of practice in private international law.

1. Concurrent Proceedings in Foreign Courts

a. International comity-based abstentions

In 2002 U.S. federal courts were faced with motions to dismiss or stay proceedings by abstaining from jurisdiction out of international comity concerns and deference to concurrent foreign litigation. U.S. courts adopted a variety of approaches toward determining under what circumstances a U.S. court should defer to foreign judicial proceedings.

(1) In *Szabo v. CGU International Insurance*, 199 F. Supp. 2d 715 (S.D. Ohio 2002), the U.S. District Court for the Southern District of Ohio denied defendant's motion for an order of abstention or, in the alternative, an order staying the proceedings in deference to litigation in British court. Three members of the Szabo family, Ohio residents, sued CGU International Insurance, a British global insurance provider, for insurance coverage of a car accident which left the fourth member of the family paralyzed. The Szabos brought suit in Ohio state court, and three days later, CGU filed suit against the Szabos in the High Court of Justice, Queen's Bench Division of the Commercial Court in London. CGU sought a declaration from the British court that none of the Szabos was insured under a CGU policy, thereby freeing CGU from liability. The U.S. suit was removed to federal court, and CGU filed a motion for order of abstention or, in the alternative, a stay of proceedings based on the British court's jurisdiction.

Excerpts below from the district court opinion explain the two-part analysis applicable to determining whether it should abstain from hearing the Szabos' case.

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The Supreme Court has repeatedly stated that "abstention from jurisdiction is the exception, not the rule, and that federal courts have a 'virtually unflagging obligation to exercise the jurisdiction given them.'" Sun Refining & Marketing Co. v. Brennan, 921 F.2d 635 (6th Cir. 1990) (quoting Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976)). "Principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in state court." . . . Under the abstention doctrine set forth in Colorado River, "considerations of judicial economy and federal-state comity may justify abstention in situations involving the contemporaneous exercise of jurisdiction by state and federal courts." Romine v. Compuserve Corp., 160 F.3d 337, 339–40 (6th Cir. 1998). The principles underlying this doctrine "rest on considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" Id. However, "abdication of the obligation to decide cases can be justified . . . only in the exceptional circumstances where . . . [it] would clearly serve an important countervailing [state] interest." Colorado River, 424 U.S. at 813. The same principles which govern parallel state and federal court proceedings apply to parallel proceedings in a foreign court. AAR Internat'l, Inc. v. Nimelias Enters. S.A., 250 F.3d 510, 518 (7th Cir. 2001) ("we apply the same general principles [concerning parallel state proceedings] with respect to parallel proceedings in a foreign court in the interests of international comity.").

In determining whether to abstain from exercising jurisdiction under Colorado River, in the interest of international comity, the Court must engage in a two-step analysis. First, the Court must evaluate whether the two proceedings are, in fact, parallel. If the actions are not parallel, the doctrine does not apply. Second, if parallel, the Court must balance the eight factors set forth in Colorado River and its progeny.

A. Parallel Proceedings

Turning to the first step, for two concurrent actions to be parallel, it is not necessary for them to be identical. Romine, 160 F.3d at

340. It is sufficient that the two proceedings are substantially similar. Id.; AAR Internat'l, 250 F.3d at 518. The presence of additional parties or additional claims will not necessarily preclude a finding that the actions are parallel. Romine, 160 F.3d at 340. "If the rule were otherwise the Colorado River doctrine could be entirely avoided by the simple expedient of naming additional parties." Lumen Constr., Inc. v. Brant Constr. Co., Inc., 780 F.2d 691, 695 (7th Cir. 1985) (quoted by Romine, 160 F.3d at 340). "The question is not whether the suits are formally symmetrical, but whether there is a 'substantial likelihood' that the foreign litigation 'will dispose of all claims presented in the federal case.' " AAR Internat'l, 250 F.3d at 518 (citation omitted). As long as the parties are substantially similar and the claims "are predicated on the same allegations as to the same material facts," the actions are to be considered parallel. Romine, 160 F.3d at 340.

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The U.S. court held that the U.S. suit and the action in the Queen's Bench court were substantially similar as both lawsuits arose out of the same automobile accident, and both attempted to determine whether the CGU insurance policy covered the plaintiffs and were thus parallel proceedings. The court then analyzed the case under the eight factors set forth in *Colorado River* and subsequent U.S. Supreme Court case law. Applying these factors, the U.S. court held that the analysis strongly favored the U.S. court retaining jurisdiction. The lawsuit did not involve any *res* over which the U.S. court retained jurisdiction. Further, litigation in England would be very inconvenient for plaintiffs as residents of Ohio, and the British defendant would be better able to conduct international litigation, as it issues global insurance policies. Looking to avoidance of piece-meal litigation, the court found that the issues pending before the British court were only whether British law applied, and if so, whether the Szabos were entitled to benefits. Therefore, complete relief would not be granted in the British court if it found Ohio law to apply. The court stated that the source of the governing law in this case had not yet been determined, and held that this supported retaining jurisdiction. The only

factor that the U.S. court found favored abstention was the adequacy of the British court in its ability to provide procedural safeguards, substantive law, and jurisdiction over the suit. On balance, the court concluded that it must continue to exercise jurisdiction, and denied the defendant's motion to abstain or stay based on the concurrent British proceedings.

(2) Although also basing its analysis on the abstention analysis developed by the Supreme Court, the U.S. District Court for the Western District of Virginia took a somewhat different approach to determining whether a U.S. court should stay or grant a two-month continuance in deference to foreign judicial proceedings. *Linear Products v. Marotech,* 189 F. Supp. 2d 461 (W.D. Va. 2002). Linear, a U.S. company, held patents in both the United States and Canada. Linear filed a patent infringement lawsuit first in Quebec, Canada against Marotech, based on its Canadian Letters Patent. While the Canadian court proceeding was still ongoing, Linear brought a similar infringement suit and motion for preliminary injunction against Marotech in the United States based on its U.S. patents. Marotech asked the U.S. court for a stay of proceedings under the doctrine of international abstention.

The court followed *Turner Entertainment Company v. Degeto Film*, 25 F.3d 1512 (11th Cir. 1994), involving interpretation of a licensing agreement, which looked to a number of factors, broadly whether the stay would (1) promote international comity, (2) respect fairness to litigants, and (3) promote efficient use of judicial resources. The *Linear* court held that this case did not warrant abstention because instead of both cases revolving around a court's interpretation of a "single operative document," separate U.S. and Canadian patents were at issue. Therefore, "with respect to the Canadian Letters Patent, it is far from certain that the same interpretation would be consistent with United States' statutes and policies if applied to the United States' Patents." The court also found the fact that Canada had not yet reached a judgment in its proceeding a "telling distinction," reasoning that "[t]he principles of comity are much more deeply

implicated where the foreign court has resolved the dispute on the merits." Although the U.S. court did not grant the stay, it did reschedule the U.S. trial date to allow the defendant, a small business, to finish defending itself in the Canadian court before defending itself in the United States.

(3) In *United Feature Syndicate v. Miller Features*, 216 F. Supp. 2d 198 (S.D.N.Y. 2002), officers of a Canadian corporation in Canadian bankruptcy proceedings filed a motion to dismiss proceedings in the District Court for the Southern District of New York alleging fraud and related charges. One of the grounds on which defendant moved to dismiss was international comity. In assessing the defendants' motion to dismiss on this ground, the court noted that "[i]n the bankruptcy context, abstaining from exercising jurisdiction on the basis of comity can be particularly appropriate, since 'the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding.' "

Ultimately, the court concluded that "there is no question that bankruptcy proceedings in Canada—a 'sister common law jurisdiction with procedures akin to our own'—are entitled to comity under appropriate circumstances." The court concluded, however, that "'the principle of comity has never meant categorical deference to foreign proceedings.' " The court placed the burden of proof on the moving defendants to demonstrate that

> deference actually would result in the avoidance of some sort of conflict—in other words, that the exercise of jurisdiction by this Court actually might fail to "demonstrate a proper level of respect for the acts" of the Canadian bankruptcy court. . . . If the claims raised in this action aren't also within the purview of the Canadian bankruptcy court, then adjudicating those claims in this court shows no disrespect to that tribunal. . . .

The court analyzed each of the plaintiff's claims to determine whether or not they were already being adjudicated in the

Canadian proceeding, and ultimately determined that several of the plaintiff's claims were sufficiently distinct from the claims in the Canadian bankruptcy proceeding to warrant the U.S. court's jurisdiction. As to those claims the court denied the motion for comity-based abstention.

(4) The U.S. District Court for the Northern District of Ohio granted a defendant's motion to stay U.S. proceedings and abstained in deference to a Canadian bankruptcy proceeding in *Banyan Licensing v. Orthosupport International*, 2002 U.S. Dist. LEXIS 17341 (N.D. Ohio Aug. 15, 2002). In a previous lawsuit, a U.S. federal court had found that the Canadian defendant's products infringed the U.S. plaintiff's patent for pain-relieving knee-pillows, and issued an injunction against the sale of the defendant's products in the United States. Defendant had violated that injunction, and plaintiff sought sanctions and other relief in this suit. In the meantime, Orthosupport filed for bankruptcy in a Canadian court, during which proceeding the Canadian court issued an order staying proceedings against the company.

The U.S. court agreed to stay its proceedings in recognition of the Canadian stay order. In support of its abstention, the U.S. court noted that "American courts routinely extended comity to the actions and judgments of Canadian bankruptcy courts on the basis that creditors, including American creditors, will be treated fairly and with due process."

b. Anti-suit injunctions

In 2002 U.S. federal courts also faced a growing number of requests by litigants in international disputes to enjoin opposing parties from pursuing suit in foreign courts concurrently, which U.S. courts have generally been reluctant to grant. Two approaches, the liberal and the restrictive approaches, have been utilized by the seven circuits that have addressed international anti-suits.

(1) Restrictive approach

(i) In *Stonington Partners v. Lernout & Hauspie Speech Products*, 310 F.3d 118 (3rd Cir. 2002), Lernout & Hauspie Speech Products ("L&H"), a Belgian company with headquarters in Belgium and Massachusetts, filed for bankruptcy concurrently in the U.S. Bankruptcy Court for the District of Delaware and in Belgian court. Shortly before L&H filed for bankruptcy, Stonington had filed an action against L&H and others in Delaware alleging that L&H had fraudulently acquired Dictaphone Corporation from it in exchange for worthless shares of L&H stock. L&H officers were arrested and jailed in Belgium on charges of securities fraud, and Stonington's action was still pending as an adversary proceeding in the Delaware bankruptcy case. Due to the difference in the two countries' bankruptcy laws, Stonington's claims based on L&H's fraudulent activities would receive equal treatment with other general secured and unsecured creditors under Belgian law, but would be subject to subordination in U.S. courts. In response to a request from L&H, the U.S. bankruptcy court enjoined Stonington from further prosecuting the "issue of the priority, treatment and classification of the fraud claims in Belgium." The district court affirmed the bankruptcy court. *Lernout and Hauspie Speech Products v. Stonington Partners*, 2001 U.S. Dist. LEXIS 22353 (D.C. Del. Sept. 21, 2001).

On appeal, the U.S. Court of Appeals for the Third Circuit held that this order "amount[ed] to an anti-suit injunction" and reversed and remanded to the bankruptcy court to "apply the approach to anti-suit injunctions that has been developed in our court and to consider comity concerns in deciding whether this is one of the rare situations in which relief is appropriate." The court further recommended that "an actual dialog occur or be attempted between the courts of the different jurisdictions in an effort to reach an agreement as to how to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects

of the foreign laws." Excerpts below provide the court's explanation of the "liberal" versus "restrictive" approaches to anti-suit injunctions and its conclusion that, although an injunction might in some situations be appropriate even under the restrictive approach on public policy grounds, the case at hand did not appear to meet that criterion.

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. . . Based on a "serious concern for comity," we have adopted a restrictive approach to granting [anti-suit injunctions.] . . .

. . . [T]he federal courts of appeals have developed two different standards, one "liberal" and the other "restrictive," for determining when to enjoin foreign proceedings, and we concluded that our jurisprudence endorsed the restrictive approach.[5] *Id. at 160–61*; see also *Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 76 (3d Cir. 1994)* (the power to enjoin a foreign action should "be exercised only in rare cases, and must be premised on a thorough analysis of the interests at stake"). . . .

Likewise, in *Compagnie des Bauxites de Guinea v. Insurance Co. of North America, 651 F.2d 877 (3d Cir. 1981)*, the district court had enjoined a party from maintaining an action filed in England. We reversed, reasoning that "restraining a party from pursuing an action in a court of foreign jurisdiction involves delicate questions of comity and therefore 'requires that such action be taken only with care and great restraint'." *Id. at 887 n. 10* . . . We

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[5] In General Electric [v. Deutz AG, 270 F.3d 144 (3rd Cir. 2001)], we contrasted the "lax" or "liberal" approach of the courts of appeals for the Fifth, Seventh, and Ninth Circuits with the "restrictive" approach adopted by the courts of appeals for the Second, Sixth, and District of Columbia Circuits. Compare Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626–28 (5th Cir. 1996) ("lax" standard); Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 431–32 (7th Cir. 1993) (same); and Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 855–56 (9th Cir. 1981) (same); with Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1354–58 (6th Cir. 1992) ("restrictive" approach); China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987) (same); and Laker Airways, 731 F.2d at 937–45 (same).

concluded that neither duplication of issues nor delay in filing justified such an injunction, and further noted that even the fact that a foreign action was "harassing and vexatious" would not, by itself, warrant injunctive relief. (fn.omitted); see also *Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1357 (6th Cir. 1992)* (if duplication were enough to justify an anti-suit injunction, "parallel proceedings would never be permitted because by definition such proceedings involve the same claim and therefore the same parties and issues") (fn. omitted).

Courts that, like us, adopt the restrictive approach to enjoining foreign proceedings acknowledge that courts may enter an anti-suit injunction on the rare occasions when needed "to protect jurisdiction or an important public policy." *General Elec., 270 F.3d at 161*; see also *Laker Airways, 731 F.2d at 927*. They have interpreted these exceptions narrowly. In *Laker Airways*, for instance, the Court of Appeals for the District of Columbia Circuit approved an anti-suit injunction where the foreign defendants initiated the foreign proceeding for the "sole purpose of terminating the United States claim" and where the foreign court had enjoined parties from pursuing an action in the United States. Id. at 915. The foreign proceeding threatened United States jurisdiction in that it "attempted to carve out exclusive jurisdiction over concurrent actions." Id. at 930.

Few cases have addressed a situation in which an anti-suit injunction has been appropriately entered to protect important public policy, but the courts that take a restrictive approach have referenced this exception as being narrowly drawn. In *Gau Shan Co.*, the Court of Appeals for the Sixth Circuit noted that "there is very little case law on the magnitude of the importance of public policy considerations to the decision whether to permit an antisuit injunction," but concluded that "only the evasion of the most compelling public policies of the forum will support the issuance of an antisuit injunction" and that the state-law treble damages remedy at issue there did not rise to that level. *956 F.2d at 1357*. Notably, the policies that the *Laker Airways* court found to justify an anti-suit injunction were not those motivating United States antitrust laws—the substance of the dispute—but instead "that United States judicial functions have been usurped, destroying the

autonomy of the courts." *Laker Airways, 731 F.2d at 939*. This is significant because, rather than focus on the public policies furthered by the substantive law, which presumably are always present, at least to some degree, the court focused on what made this case unusual—namely, the degree of foreign interference with properly invoked United States concurrent jurisdiction.

L&H urges us to find that the situation before the Bankruptcy Court fits into either or both of these narrow exceptions. Clearly jurisdiction is not implicated in the way it was in Laker Airways. Not only is there no indication that the Belgian proceeding's sole purpose was to deprive the United States court of its jurisdiction (fn. omitted), but also L&H, rather than Stonington, had initiated the foreign proceeding. . . .

. . . [W]e note that, if indeed Stonington was inducted to take equity through fraud, this might dilute L&H's argument that subordinating Stonington's claims promotes an important public policy. . . .

* * * *

(ii) In *Dow Jones v. Harrods*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002), the U.S. District Court for the Southern District of New York had before it a request for declaratory judgment and injunctive relief brought by Dow Jones, a U.S. company that owns the Wall Street Journal. The litigation arose out of a Wall Street Journal article that dubbed Harrods "the Enron of Britain" in response to Harrods' April fool's joke of announcing that its chairman was "going to 'float' " Harrods, which Dow Jones originally interpreted to mean that Harrods was going public. Harrods demanded that Dow Jones run an apology and pay compensation for the damage to Harrods' reputation from the article. Dow Jones refused, asserting that the article was intended as "humorous commentary." On May 24, 2002, believing that Harrods was threatening suit, Dow Jones sought an injunction in the Southern District of New York under the Declaratory Judgment Act, 28 U.S.C. § 2201(a) ("DJA"), to preclude Harrods from pursuing libel claims in London or "related litigation against Dow Jones in any other forum in the world." On May 29, Harrods brought

suit in the High Court of Justice in London seeking damages for libel.

The U.S. court noted that the DJA confers only discretionary jurisdiction upon federal courts, and that it "provides that in a case of an 'actual controversy' within its jurisdiction, '[a] federal court may declare the rights and other legal relations of any interested party seeking such a declaration. . . .'" The court denied relief, concluding that "Dow Jones' claim of impending harm, and its fears of enforcement of an adverse judgment, are too abstract, remote and hypothetical to constitute an actual controversy qualifying for the declaratory relief it seeks."

The court rejected Dow Jones' claims that the First Amendment right to free speech warranted enjoining any related litigation against Dow Jones in any other judicial forum. The court applied the Second Circuit's restrictive test to anti-suit injunctions and held that such an injunction was not warranted here. Internal citations have been omitted from the excerpts from the opinion set forth below.

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American law contains among the most extensive mantle of rights and safeguards to guarantee and protect individual freedoms and fundamental fairness.

* * * *

. . . Dow Jones urges, [that] United States courts in general, and this Court in particular, are thus uniquely poised to seize the opportunity to reinforce and enlarge the First Amendment protections American publishers enjoy so as to bar preemptively potential liability for any alleged defamation injury their commercial activities conducted in this country and transmitted through the worldwide web may cause in foreign jurisdictions. Validating this proposition would make it appropriate and commonplace for litigants to resort to federal courts under the DJA to obtain declarations of non-liability and injunctive relief whenever a party alleges that it faces even a mere prospect of a lawsuit or contingent

liability in a foreign jurisdiction whose laws or procedures may conflict in some way with fundamental rights enjoyed under United States law.

Thus, under Dow Jones' hypothesis, the DJA would confer upon an American court a preemptive style of global jurisdiction branching worldwide and able to strike down offending litigation anywhere on Earth. Intriguing as such universal power might appear to any judge, this Court must take a more modest view of the limits of its jurisdiction, and offers a more humble response to the invitation and temptation to overreach. The Court finds nothing in the United States Constitution, nor in the DJA or in customary practice of international law, that comports with such a robust, Olympian perspective of federal judicial power.

* * * *

In fact, Dow Jones' hypothesis finds no support in international law principles or practice. As one leading commentator observed: "Courts of foreign countries, while likely to use comity language, will be reluctant to give effect to any injunctions purporting to restrain their own citizens and transactions (footnote omitted). Nor is Dow Jones' proposition likely to gain a sympathetic ear in the United Kingdom to compel a stay of the London Action in favor of the instant proceeding in this Court. Under British practice, where a plaintiff in England is the defendant in a foreign action involving the same parties and events, the courts are reluctant to stay the English proceedings. " 'The court ought not to stay a plaintiff in the courts of this country on the ground that he happens to be a defendant elsewhere.' " Even were this Court to grant the relief Dow Jones seeks, its judgment may not be entitled to recognition or enforcement in the United Kingdom to the extent the British courts may find it contrary to English public policy, or to constitute an effort to prevent the administration of justice for an unjust end.

* * * *

To be sure, the Supreme Court has left open the possibility that a strong demonstration of bad faith or harassment sufficiently unusual or unconscionable could justify federal intervention to

protect the exercise of First Amendment rights against a particular potential infringement in a state proceeding. It made clear, however, that such interference could be justified only in very narrow, "extraordinary circumstances."

Here, Dow Jones has not made a persuasive case that Harrods' mere filing of the London Action represents sufficient extraordinary circumstances demonstrating unconscionable bad faith or harassment.

* * * *

(2) Liberal approach

(i) In *Macphail v. Oceaneering International*, 302 F.3d 274 (5th Cir. 2002), the U.S. Court of Appeals for the Fifth Circuit reversed a district court decision granting plaintiff's motion to enjoin defendant from pursuing proceedings in the Supreme Court of Western Australia. MacPhail, an Australian deep sea diver, had brought suit in the District Court for the Western District of Australia against Oceaneering, a Texas-based multi-national corporation, for injuries sustained while he was employed by the defendant as a saturation diver in Australia. The Australian court entered a final judgment on the basis of a negotiated settlement between MacPhail and Oceaneering, providing $280,000 and other compensation to MacPhail. The Deed of Release and Discharge signed by MacPhail provided that it would be governed by the laws of Western Australia and included a forum selection clause, in which the parties agreed to submit any dispute arising from it to the exclusive jurisdiction of the Australian courts.

Subsequently, MacPhail traveled to the United States and received medical treatment revealing that he had more serious brain and nerve damage than previously thought. As a result, MacPhail filed suit against Oceaneering in the U.S. District Court for the Southern District of Texas under U.S. maritime law and Texas state law. Oceaneering filed a motion to dismiss based on the release and its forum selection clause. When the district court denied Oceaneering's motion,

Oceaneering filed a writ of summons in the Supreme Court of Western Australia seeking specific performance of the release. MacPhail filed a motion to enjoin the Australian proceeding, which the U.S. district court granted.

The district court applied the "liberal approach" to anti-suit injunctions, which it characterized as "plac[ing] minimal importance on international comity and hold[ing] that a court may enjoin a foreign proceeding if that parallel proceeding is vexatious and duplicative . . ." 186 F. Supp. 2d 704 (S.D. Tex 2002). In doing so, it cited to applicable Fifth Cicuit precedent in *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996). The Fifth Circuit vacated the district court's order. It confirmed that under *Kaepa*, "[t]wo factors are relevant to our comity analysis . . . : whether the foreign litigation is duplicitous [sic] and vexatious litigation; and whether the injunction is necessary to protect the court's jurisdiction." On the facts of the case before it, however, the court found neither basis to apply.

(ii) A variation of the liberal approach was applied by the U.S. District Court for the Northern District of Illinois in *Varrin v. Queen's University*, 2002 U.S. Dist. LEXIS 16580 (N.D. Il. Sept. 3, 2002). The plaintiff, a Canadian resident, sought an order in U.S. court declaring himself a joint inventor of two patents that he helped create while working for the defendant, Queen's University. After Varrin's request was filed, the university filed suit in Ontario, Canada, seeking a declaration that any rights Varrin had to the patents belonged to the university as his employer. Varrin sought an order from the U.S. district court enjoining the defendant from proceeding in Canada.

The court applied the liberal standard, that "[i]njunctions against foreign litigation are allowed upon a finding that letting the two suits proceed would be gratuitously duplicative, or as the cases sometimes say, vexatious and oppressive." On this basis, the U.S. court enjoined the defendant from proceeding in Canada. The court also noted that international comity must be weighed by asking "[w]hen every practical consideration supports the injunction," whether "the issuance

of an injunction really would throw a monkey wrench, however small, into the foreign relations of the United States." The court's conclusion follows.

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The core issue in the present suit is inventorship, and the defense to that claim is ownership. Queen's University's suit in Canada, claiming ownership of these inventions, constitutes a compulsory counterclaim because it arises out of the same transaction or occurrence that is the subject matter of the instant suit—the invention and ownership of the two United States patents while Varrin was in Queen's University's employ. . . . However, neither this Court nor a Canadian court need decide the issue of ownership if Varrin is unable to prove his inventorship claim. Thus, this present suit may be dispositive of the Canadian suit. Allowing both suits to proceed would result in a duplication of efforts. Resolution in both courts could also result in inconsistent results. Furthermore, Queen's University has not made any indication that the issuance of an injunction would "throw a monkey wrench, however small, into the foreign relations of the United States" and Canada.

* * * *

2. Recognition and Enforcement of Foreign Arbitral Awards

As a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 3 (1958) ("the New York Convention"), the United States is obligated to recognize and enforce arbitral awards made in another State's territory unless (1) the parties were incapacitated at the time of agreement, (2) the agreement to arbitrate is not valid under the parties' choice of law or where the award was made; (3) the losing party was not given proper notice of the arbitration proceedings or was otherwise unable to present his case; (4) the arbitration award deals with subject matter outside the scope of the parties' agreement to

arbitrate; (5) the arbitration board's composition was contrary to the parties' agreement or against the law of the country where the arbitration took place, or (6) the award is not yet binding. New York Convention, Art. V(a)–(e).

In *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Company*, 284 F.3d 1114 (9th Cir. 2002), Glencore Grain, a Netherlands corporation, entered into a contract to purchase rice from Shivnath Rai, an Indian rice exporter. A dispute subsequently arose under the contract concerning delivery of rice. Pursuant to the contract's arbitration clause, the dispute was arbitrated before the London Rice Brokers' Association, which ruled in favor of Glencore Grain ("Glencore"), awarding it roughly $6.5 million plus interest. Shivnath Rai did not challenge the decision in England, nor did he pay the award. Glencore filed suit in the High Court of Delhi at New Delhi, India, to enforce the award, and while the suit in India was pending, filed an application in the U.S. District Court for the Northern District of California, seeking confirmation of the arbitral award under the New York Convention. Shivnath filed a motion to dismiss on six different grounds, including absence of personal jurisdiction. The district court dismissed the action for lack of personal jurisdiction over Shivnath Rai, finding insufficient contacts to exercise general jurisdiction and no specific jurisdiction because the cause of action did not arise out of or relate to any actions by Shivnath Rai within the state of California.

Glencore appealed the dismissal, arguing that neither the New York Convention nor the Federal Arbitration Act ("FAA"), the U.S. implementing legislation for the New York Convention, 9 U.S.C. § 201–208, expressly requires personal jurisdiction and that the lack of personal jurisdiction over the defendant in the state where enforcement is sought is not among the Convention's seven defenses to recognition and enforcement. The court of appeals rejected Glencore's argument. While recognizing the "pro-enforcement bias" of the Convention and the FAA, the court analyzed the issue of personal jurisdiction in cases brought under the New York Convention as follows (internal citations omitted):

> It is a bedrock principle of civil procedure and constitutional law that a "statute cannot grant personal jurisdiction where the Constitution forbids it.". . . . The personal jurisdiction requirement . . . "flows . . . from the Due Process Clause . . . [and] represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." District courts determine the existence vel non of personal jurisdiction not by reference to statutory imprimatur, but by inquiring whether maintenance of a suit against the defendant comports with the constitutional notions of due process . . . Thus, it is not significant in the least that the legislation implementing the [New York] Convention lacks language requiring personal jurisdiction over the litigants. We hold that neither the Convention nor its implementing legislation removed the district courts' obligation to find jurisdiction over the defendant in suits to confirm arbitration awards.

The court also noted that to interpret the FAA as "dispensing with the jurisdictional requirements of Due Process in actions to confirm arbitral awards would raise clear questions concerning the constitutionality of the statutes." The court affirmed the district court's dismissal of the action based on its lack of personal jurisdiction over Shivnath Rai.

3. Evidence: Discovery for Use in a Foreign Tribunal

Section 1782 of title 28 of the United States Code provides, in pertiment part, that a U.S. 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, including criminal investigations conducted before formal accusation."

In *Advanced Micro Devices v. Intel Corporation*, 292 F.3d 664 (9th Cir. 2002), Advanced Micro Devices ("AMD") filed a complaint with the Directorate General-Competition of the European Commission ("Directorate")

alleging violation of the EC treaty by Intel, its worldwide competitor in the micro-processing industry. In the U.S. District Court for the Northern District of California, AMD sought discovery under section 1782 asking that Intel produce transcripts of testimony from a proceeding in another district court. Intel objected, claiming that the matter before the Directorate was not a "proceeding in a foreign or international tribunal" within the meaning of section 1782. The court agreed and denied discovery. The Ninth Circuit reversed, noting that the case presented a question of first impression. Excerpts below provide the court's analysis of the nature of the EC proceeding and its rejection of Intel's further argument that section 1782 required that AMD show that it could obtain the discovery in the EC proceedings, an issue on which U.S. federal circuit courts are split. Internal citations have been omitted.

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[T]he EC is an administrative body and . . . the investigation being conducted by its Directorate is related to a quasi-judicial or judicial proceeding. AMD has the right to petition the EC to stop what it believes is conduct that violates the EC Treaty, to present evidence it believes supports its allegations, to have the EC evaluation what it presents and to have the resulting action (or inaction) reviewed by the European courts. Although preliminary, the process qualifies as a "proceeding before a tribunal" within the meaning of 28 U.S.C. § 1782.

* * * *

We have previously rejected a requirement regarding admissibility in the foreign tribunal. For good and sound policy reasons, we now reject such a requirement with respect to discoverability, be the request from a private party or foreign tribunal. We find nothing in the plain language or legislative history of Section 1782, including its 1964 and 1996 amendments, to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding. Had

Congress wished to impose such a requirement on the parties, it could have easily done so. . . .

Finally, allowance of liberal discovery seems entirely consistent with the twin aims of Section 182 providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts.

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4. Service of Process Abroad

Cases involving foreign litigants often require service of process to be delivered abroad. The United States is a party to the Convention on Service Abroad of Judicial Documents in Civil and Commercial Matters (the "Hague Service Convention" or "HSC"), 20 U.S.T. 361, 362 T.I.A.S. No. 6638 (1965). Each state party to the HSC designates a central authority that handles all service requests from other parties for the purpose of creating an "appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of an addressee in sufficient time." U.S. Federal Rule of Civil Procedure 4(f)(1) permits service of process on a foreign corporation "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague [Service] Convention."

In *Nuovo Pignone, Spa v. Storman Asia*, 310 F.3d 374 (5th Cir. 2002), the plaintiff in a breach of contract and tort action effected service of process on the defendant, an Italian company, by sending the complaint and summons via Federal Express mail to the company's president in Milan, Italy. The defendant moved to dismiss on grounds, inter alia, that such service of process was improper under Article 10(a) of the HSC and thus violated Federal Rule of Civil Procedure 4(f)(1). The district court denied the motion to dismiss, concluding that service by mail of foreign parties was permissible under Article 10(a). On appeal, the Fifth Circuit overturned the lower court decision on this issue and remanded for further

proceedings, with instructions that Nuovo Pignone be permitted a reasonable time to effect proper service. Excerpts below provide the Fifth Circuit's analysis of Article 10(a) of the HSC, a provision that has caused a split among U.S. circuit courts. Internal citations and footnotes have been omitted.

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The parties disagree over the interpretation of article 10(a), which states in context:

> Provided the State of Designation does not object, the present Convention does not interfere with
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of designation,
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Nuovo Pignone contends that article 10(a) permits service of process by mail. Fagioli argues that the subsection refers only to the transmission of legal documents following service, pointing to the fact that nowhere else in the Hague Convention is the word "send" used to refer to service of process; rather, the drafters use the words "serve," "service," and "to effect service" in other sections, including subparts (b) and (c) of article 10.

The parties' differing positions reflect a circuit split over an issue this court has yet to address. Those courts that have concluded that article 10(a) permits service of foreign parties by mail have looked to the broad purpose of the Hague Convention—facilitating service abroad—and concluded that article 10(a) would be "superfluous unless it was related to the sending of such documents

for the purpose of service." These courts have opined that the use of the term send, rather than service, in article 10(a) should be attributed to careless drafting.

Other courts have held that the word "send" in article 10(a) is not the equivalent of service of process. These courts have interpreted article 10(a) as providing a method for sending subsequent documents after service of process has properly been obtained. Despite the broad purpose of the Hague Convention, these courts have noted that the word "service" is used in other sections of the Hague Convention, including subparts (b) and (c) of article 10 and articles 9, 15 and 16, which all refer to forwarding documents for the purpose of service. So, if the drafters had meant for article 10(a) to provide an additional manner of service of judicial documents, they would have used "service" instead of "send."

We adopt the reasoning of courts that have decided that the Hague Convention does not permit service by mail. In doing so, we rely on the canons of statutory interpretation rather than the fickle presumption that the drafters' use of the word "send" was a mere oversight. "Absent a clearly expressed legislative intention to the contrary," a statute's language "must ordinarily be regarded as conclusive." And because the drafters purposely elected to use forms of the word "service" throughout the Hague Convention, while confining use of the word "send" to article 10(a), we will not presume that the drafters intended to give the same meaning to "send" that they intended to give to "service."

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Finally, we note that other provisions of the Hague Convention describe more reliable methods of effecting service. Service of process through a central authority under articles 2 through 7 and service through diplomatic channels under articles 8 and 9 require that service be effected through official government channels. It is unlikely that the drafters would have put in place these methods of service requiring the direct participation of government officials, while simultaneously permitting the uncertainties of service by mail.

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Cross References

International child abduction, **Chapter 2.B.1.**
Forum non conveniens in litigation under the Alien Tort Statute and Torture Victims Protection Act, **Chapter 6.G.5.a.(2) and (5) and 6.G.5.c.**

Chapter 16

Sanctions

MODIFICATION OR LIFTING OF SANCTIONS

1. Terrorism-Related Measures

a. Taliban-controlled territory

As a result of the military action in Afghanistan, the Taliban were driven from the territory in Afghanistan they had controlled. Designations of the Taliban and Taliban-controlled assets for purposes of sanctions imposition were accordingly modified. In a letter to the president of the Security Council dated December 14, 2001, the chairman of the UN Security Council Committee established pursuant to paragraph 6 of Resolution 1267 (1999) ("1267 Committee"), indicated the rapidly changing circumstances concerning Taliban control over territory in Afghanistan. The letter transmitted the following statement:

> The Committee established by Security council resolution 1267 (1999) notes its responsibility under Security council resolution 1333 (2000) to designate 'territory of Afghanistan under Taliban control' for purposes of defining the coverage of the embargo. In light of the rapidly changing situation in Afghanistan, the Committee notes that maps of Afghanistan territory under Taliban control are obsolete and rapidly become obsolete. The Committee reminds member States of their continuing obligations under all relevant Security Council resolutions

> not to provide assistance to the Taliban, Al-Qaida, and Usama bin Laden and individuals and entities associated with them.

S2001/1226, available at *www.un.org/Docs/sc/committees/1267/1226e.pdf.*

(1) Modification of Executive Order 13129

On January 24, 2002, Richard L. Armitage, Deputy Secretary of State, issued an order to modify the description of "territory of Afghanistan controlled by the Taliban" in Executive Order 13129 to reflect his determination that the Taliban controls no territory within Afghanistan. 67 Fed. Reg. 4301 (Jan. 29, 2002). The notice is set forth below.

Executive Order 13129 of July 4, 1999, blocks property and prohibits transactions with the Taliban. Under section 4(d) of this Order, the Secretary of State, in consultation with the Secretary of the Treasury, is authorized to modify the description of the term "territory of Afghanistan controlled by the Taliban." Acting under the authority delegated to me by the Secretary of State in Delegation of Authority 235 of October 14, 1999, and in consultation with the Secretary of the Treasury, I hereby determine as of this date that the Taliban controls no territory within Afghanistan, and modify the description of the term "territory of Afghanistan controlled by the Taliban" to reflect that the Taliban controls no territory within Afghanistan.

(2) Termination of emergency

On July 2, 2002, President George W. Bush issued Executive Order 13268. The order terminated the national emergency described and declared in Executive Order 13129 of July 4, 1999, 64 Fed. Reg. 36757 (July 7, 1999), related to the actions and policies of the Taliban based on the Taliban's control of

territory in Afghanistan. At the same time, the order amended Executive Order 13224 of September 23, 2001, 66 Fed. Reg. 49,079 (Sept. 25, 2001), to include reference to Mohammed Omar and the Taliban in the annex to that order, thus preserving the sanctions imposed against the Taliban. Excerpts from the executive order are set forth below. For a discussion of Executive Order 13224, *see Digest 2001* at 881–887.

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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.), the National Emergencies Act (50 U.S.C. 1601 et seq.) (NEA), section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c), and section 301 of title 3, United States Code,

I, GEORGE W. BUSH, President of the United States of America, find that the situation that gave rise to the declaration of a national emergency in Executive Order 13129 of July 4, 1999, with respect to the Taliban, in allowing territory under its control in Afghanistan to be used as a safe haven and base of operations for Usama bin Ladin and the Al-Qaida organization, has been significantly altered given the success of the military campaign in Afghanistan, and hereby revoke that order and terminate the national emergency declared in that order with respect to the Taliban. At the same time, and in order to take additional steps with respect to the grave acts of terrorism and threats of terrorism committed by foreign terrorists, the continuing and immediate threat of further attacks on United States nationals or the United States, and the national emergency described and declared in Executive Order 13224 of September 23, 2001, I hereby order:

Section 1. The Annex to Executive Order 13224 of September 23, 2001, is amended by adding thereto the following persons in appropriate alphabetical order:

Mohammed Omar (aka, Amir al-Mumineen [Commander of the Faithful])

The Taliban.

Sec. 2. For the purposes of this order and Executive Order 13224 of September 23, 2001, the term "the Taliban" is also known as the "Taleban," "Islamic Movement of Taliban," "the Taliban Islamic Movement," "Talibano Islami Tahrik," and "Tahrike Islami'a Taliban". The Secretary of State, in consultation with the Secretary of the Treasury, is hereby authorized to modify the definition of the term "the Taliban," as appropriate.

Sec. 3. Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 4. Pursuant to section 202 of the NEA (50 U.S.C. 1622), termination of the national emergency with respect to the Taliban shall not affect any action taken or proceeding pending not finally concluded or determined as of the date of this order, or any action or proceeding based on any act committed prior to the date of this order, or any rights or duties that matured or penalties that were incurred prior to the date of this order.

(3) International Traffic in Arms Regulations

Also effective July 2, 2002, the Department of State removed Afghanistan from the International Traffic in Arms Regulations Proscribed List. 67 Fed. Reg. 44,452 (July 2, 2002). A press statement on that day explained the effect of the action taken. It is available at *www.state.gov/r/pa/prs/ps/2002/11606pf.htm*.

The Department of State has ended its policy of denial with respect to commercial defense trade with the Government of Afghanistan (the Transitional Administration) by modifying the application of the International Traffic in Arms Regulations proscribed list (22 C.F.R. section 126.1(a)) with respect to Afghanistan, effective July 2, 2002.

The Department of State is amending the International Traffic in Arms Regulations to modify the policy of denial regarding

Afghanistan. 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 Afghanistan except for the Government of Afghanistan and the International Security Assistance Force (ISAF). All requests for licenses or other approvals for these entities in Afghanistan involving items covered by the U.S. Munitions List will no longer be presumed to be disapproved. Any application for such a transaction will, of course, be analyzed carefully on a case-by-case basis by the relevant U.S. Government agencies to ensure that they conform to U.S. law and policy objectives.

b. Continued Sanctions: UN Security Council Resolution 1390

On January 16, 2002, the Security Council of the United Nations, acting under chapter VII of the UN Charter, adopted Resolution 1390. U.N. Doc. No. S/RES/1390 (2002). In Resolution 1390, the Security Council decided to continue the measures imposed by paragraph 8(c) of Resolution 1333 (2000) and took note of the continued application of the measures imposed by paragraph 4(b) of Resolution 1267 (1999). Together these two provisions froze funds and other financial resources owned or controlled directly or indirectly by Usama bin Laden, members of the Taliban and the al-Qaida organization, and their associates. The 1267 Committee, noted *supra* in B.1.a., is responsible, among other things, for maintaining a list of individuals and entities associated with al-Qaida, Usama bin Laden, and the Taliban in order to implement the sanctions.

Paragraph 2 of Resolution 1390 required all states to take the following measures with respect to those appearing on the consolidated list maintained by the 1267 Committee: (a) freeze without delay any funds and other financial assets or economic resources; (b) prevent the entry into or the transit through their territories, and (c) prevent the direct or indirect supply, sale and transfer of all arms and related materiel, spare parts and technical advice, assistance, or training related to military activities.

c. *Guidelines for the 1267 Committee*

On August 15, 2002, the Chairman of the 1267 Committee issued a statement on de-listing procedures that provided a non-exclusive mechanism for individuals and entities included on the Committee's consolidated list to petition for the removal of their names from that list. On November 7, 2002, the 1267 Committee adopted new guidelines for the conduct of its work. The new guidelines included, among other things, these non-exclusive procedures for "de-listing." The relevant section of the guidelines is set forth below. *See* discussion of U.S. de-listing of certain entities in Chapter 3.1.c.

The statement of the chairman of the 1267 Committee regarding the de-listing procedures is available at *www.un.org/News/Press/docs/2002/sc7487.doc.htm*. The full text of the guidelines is available at *www.un.org/Docs/sc/committees/1267/Template.htm*.

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6. *De-listing*

(a) Without prejudice to available procedures, a petitioner (individual(s), groups, undertakings, and/or entities on the 1267 Committee's consolidated list) may petition the government of residence and/or citizenship to request review of the case. In this regard, the petitioner should provide justification for the de-listing request, offer relevant information and request support for de-listing;

(b) The government to which a petition is submitted (the petitioned government) should review all relevant information and then approach bilaterally the government(s) originally proposing designation (the designating government(s)) to seek additional information and to hold consultations on the de-listing request;

(c) The original designating government(s) may also request additional information from the petitioner's country of citizenship or residency. The petitioned and the designating government(s)

may, as appropriate, consult with the Chairman of the Committee during the course of any such bilateral consultations;

(d) If, after reviewing any additional information, the petitioned government wishes to pursue a de-listing request, it should seek to persuade the designating government(s) to submit jointly or separately a request for de-listing to the Committee. The petitioned government may, without an accompanying request from the original designating government(s), submit a request for de-listing to the Committee, pursuant to the no-objection procedure;

(e) The Committee will reach decisions by consensus of its members. If consensus cannot be reached on a particular issue, the Chairman will undertake such further consultations as may facilitate agreement. If, after these consultations, consensus still cannot be reached, the matter may be submitted to the Security Council. Given the specific nature of the information, the Chairman may encourage bilateral exchanges between interested Member States in order to clarify the issue prior to a decision.

d. Exceptions for basic expenses and other extraordinary expenses: UN Security Council Resolution 1452

A number of countries, including the United States, had concerns about the absence of express authorization in the relevant UN resolutions to allow Member States to make available to individuals funds and other financial assets or economic resources necessary to meet their basic living needs and reasonable professional fees associated with the provision of legal services, among other things. On December 20, 2002, the UN Security Council issued Resolution 1452, U.N. Doc. No. S/RES/1452(2002), making technical corrections to Resolutions 1267 and 1390. The amendments allow for certain limited exceptions to existing financial sanctions against Usama bin Laden, members of the Taliban and the al-Qaida organization, and their associates. Paragraph 1 of Resolution 1452 provides that the Security Council, acting under Chapter VII of the UN Charter:

Decides that the provisions of paragraph 4 (b) of resolution 1267 (1999), and paragraphs 1 and 2 (a) of resolution 1390 (2002), do not apply to funds and other financial assets or economic resources that have been determined by the relevant State(s) to be:

(a) necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources, after notification by the relevant State(s) to the Committee established pursuant to resolution 1267 (1999) (hereinafter referred to as "the Committee") of the intention to authorize, where appropriate, access to such funds, assets or resources and in the absence of a negative decision by the Committee within 48 hours of such notification;

(b) necessary for extraordinary expenses, provided that such determination has been notified by the relevant State(s) to the Committee and has been approved by the Committee. . . .

e. International cooperation in disruption of terrorist financing

On November 20, 2002, Jimmy Gurulé, Under Secretary for Enforcement, U.S. Department of the Treasury, testified before the U.S. Senate Judiciary Committee on efforts taken to disrupt terrorist financing since September 11, 2001. Excerpts below from the testimony focus on international cooperative efforts, including the work of the 1267 Committee.

The full text of Under Secretary Gurulé's testimony is available at *www.treasury.gov/press/releases/po3635.htm*.

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United Nations

Because of its global nature and its ability to require states to take action under Chapter VII of the UN Charter, the UN offered the quickest route for globalizing the war against terrorism in general and terrorist financing in particular. The United States has worked diligently with the UN Security Council to adopt international resolutions, which reflect the goals of our domestic executive orders by requiring UN member states to freeze terrorist-related assets. These UN Security Council resolutions form the legal basis for freezing terrorist assets on a global basis.

The UN 1267 Committee is responsible for UN designations of individuals and entities associated with al-Qaida, Usama bin Laden, and the Taliban. States wishing to propose a name for UN designation typically include a statement of the basis for designation, along with identifying information for the use of financial institutions, customs and immigration officials, and others who must implement sanctions. If no state objects to the proposed designation within 48 hours after a name is circulated by the Committee Chairman, the designation becomes effective. The 1267 Committee then puts out an announcement on its web site and all UN member states are required to freeze any assets held by the designated party(ies), without delay.

We have worked with our allies in the UN to pursue bilateral and multilateral designations of terrorist-related parties where possible and appropriate. We have achieved some notable successes in this area to date:

U.S.-Saudi Joint Designations—On March 11, 2002, the United States participated in its first joint designation of a terrorist supporter. The United States and Saudi Arabia jointly designated the Somalia and Bosnia-Herzegovina offices of Al Haramain, a Saudi-based NGO. These two organizations are linked to al-Qaida and their names were forwarded to the Sanctions Committee for inclusion under the UNSCR 1333/1390 list. On September 9, 2002, the United States and Saudi Arabia jointly referred to the Sanctions Committee Wa'el Hamza Julaidan, an associate of Usama bin Laden and a supporter of al-Qaida terror.

G7 [Group of Seven industrialized countries] Joint Designation —On April 19, 2002, the United States, along with the other G7

members, jointly designated nine individuals and one organization. Most of these groups were European-based al-Qaida organizers and financiers of terrorism.

Because of their al-Qaida links, all ten of these names were forwarded to the UN Sanctions Committee for inclusion under the UNSCR 1333/1390 list.

U.S.-Italy Joint Designation—On August 29, 2002, the United States and Italy jointly designated 11 individuals and 14 entities. All of the individuals were linked to the Salafist Group for Call and Combat designated in the original U.S. Annex to E.O. 13224. The 14 entities are part of the Nada/Nasreddin financial network, two terrorist financiers designated on earlier E.O. 13224 lists.

U.S.-Central Asia Joint Designation—On September 6, 2002, the United States, Afghanistan, Kyrgyzstan, and China jointly referred to the Sanctions Committee the Eastern Turkistan Islamic Movement, an al-Qaida-linked organization which operates in these and other countries in Central Asia.

Designation of Jemaa Islamiyya—On October 23, 2002, the United States designated the Southeast Asian terrorist group, Jemaa Islamiyya, suspected by many in the media of perpetrating the deadly attacks on a nightclub in Bali on October 12th. In the subsequent request of the United Nations to also designate this group for its ties to the al-Qaida organization, the U.S. joined Australia, Indonesia, Singapore, and 46 other countries, including all the members of ASEAN and the EU, in requesting Jemaa Islamiyya's designation. This represents the most widespread show of support of any terrorist designation to date.

Beyond designating terrorist-related parties for blocking action on a global basis, the UN has also asked for countries to identify needs for technical assistance in order to comply with UN resolutions and conventions against terrorist financing. The UN has required all member states to submit reports on the steps they have taken to implement the various actions against terrorist financing called for in UNSCR 1373. To date, 187 members have completed their reports. The UN is reviewing those reports with the intent of identifying gaps that member nations need to fill in order to comply with UNSCR 1373.

Financial Action Task Force (FATF)

Since 1989, the 31-member FATF has served as the preeminent anti-money laundering multilateral organization in the world. The United States has played a leading role in the development of this organization. Capitalizing on this financial crime expertise, on October 31, 2001, at the United States' initiative, the FATF issued Eight Special Recommendations on terrorist financing, requiring all member nations to:

(1) Ratify the UN International Convention for the Suppression of the Financing of Terrorism and implement relevant UN Resolutions against terrorist financing;
(2) Criminalize the financing of terrorism, terrorist acts and terrorist organizations;
(3) Freeze and confiscate terrorist assets;
(4) Require financial institutions to report suspicious transactions linked to terrorism;
(5) Provide the widest possible assistance to other countries' laws enforcement and regulatory authorities for terrorist financing investigations;
(6) Impose anti-money laundering requirements on alternative remittance systems;
(7) Require financial institutions to include accurate and meaningful originator information in money transfers; and
(8) Ensure that non-profit organizations cannot be misused to finance terrorism.

Many non-FATF counties have committed to complying with the Eight Recommendations and over 90 non-FATF members have already submitted self-assessment questionnaires to FATF describing their compliance with these recommendations. Together with the Departments of State and Justice, Treasury will continue to work with the FATF to build on its successful record in persuading jurisdictions to adopt anti-money laundering and anti-terrorist financing regimes to strengthen global protection against terrorist finance.

As part of this effort, FATF has established a Working Group on Terrorist Financing (Working Group), which the United States is co-chairing with Spain, devoted specifically to developing and strengthening FATF's efforts in this field. At the most recent FATF Plenary in October 2002, the Working Group, in collaboration with the World Bank, the IMF, and the UN CTC, identified a number of countries to receive priority technical assistance in order for them to come into compliance with the Eight Special Recommendations on Terrorist Financing.

Egmont Group

Through the Department of the Treasury Financial Crimes Enforcement Network ("FinCEN"), we have directed the attention of the Egmont Group towards terrorist financing. The Egmont Group represents 69 Financial Intelligence Units (FIUs) from various countries around the world. FinCEN is the FIU for the United States. The FIU in each nation receives financial information (such as SARs) from financial institutions pursuant to each government's particular anti-money laundering laws, analyzes and processes these disclosures, and disseminates the information domestically to appropriate government authorities and internationally to other FIUs in support of national and international law enforcement operations.

Since September 11th, the Egmont Group has taken steps to leverage its information collection and sharing capabilities to support the United States in its global war on terrorism. On October 31, 2001, FinCEN hosted a special Egmont Group meeting that focused on the FIUs' role in the fight against terrorism. The FIUs agreed to: (i) work to eliminate impediments to information exchange; (ii) make terrorist financing a form of suspicious activity to be reported by all financial sectors to their respective FIUs; (iii) undertake joint studies of particular money laundering vulnerabilities, especially when they may have some bearing on counterterrorism, such as hawala; and create sanitized cases for training purposes.

Approximately ten additional candidate FIUs currently are being considered for admission to the Egmont Group. Egmont has

conducted and will continue to host training sessions to improve the analytical capabilities of FIU staff around the world. FinCEN is heavily engaged in these efforts and recently participated in the international training session held Oaxaca, Mexico, co-hosted with the UN.

Bilateral/Multilateral Law Enforcement Cooperation

An unintended consequence for al-Qaida of its heinous actions on September 11th has been unprecedented international law enforcement cooperation and information sharing on a scale inconceivable prior to the 9/11 attack. As these efforts continue to improve, terrorist cells and networks become more vulnerable. Let me briefly recount some of our successes with respect to international law enforcement cooperation:

U.S.-Swiss Operative Working Arrangement: On September 4, 2002, a working arrangement signed by the Attorney Generals of Switzerland and the United States and the Deputy Secretary of the Treasury was agreed to in Washington. Under this arrangement, Swiss and U.S. federal agents have been assigned to each country's terrorism and terrorist financing task forces in order to accelerate and amplify work together on cases of common concern. Bilateral cooperation and assistance is occurring on a more informal basis in many other countries.

Successful Results: International law enforcement cooperation has resulted in approximately 2290 arrests of suspected terrorists and their financiers in 99 countries from September 12, 2001 through October 28, 2002. Some of these arrests have led to the prevention of terrorist attacks in Singapore, Morocco and Germany, and have uncovered al Qaida cells and support networks in Italy, Germany, Spain, the Philippines and Malaysia, among other places. In addition, soon after September 11th, a Caribbean ally provided critical financial information through its FIU to FinCEN that allowed the revelation of a financial network that supported terrorist groups and stretched around the world.

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2. Iraq Oil-for-Food Program

a. UN Security Council Resolution 1409

In May 2002 the United States led an initiative to streamline UN procedures for the export of goods into Iraq under the Oil-for-Food Program, established under UN Security Council Resolution 986, April 14, 1995. U.N. Doc. No. S/RES/1409 (2002). Resolution 1409 authorized the export of all goods, except those prohibited under the arms embargo or contained on a list of "dual-use" items that could have military or weapons of mass destruction applications. Items on this "Goods Review List" are subject to special review procedures. The full text of remarks by Secretary of State Colin L. Powell, May 14, 2002, in Reykjavik, Iceland, welcoming the adoption of Resolution 1409 is provided below.

Secretary Powell's remarks are available at *www.state.gov/secretary/rm/2002/10130pf.htm*.

I applaud the action by the UN Security Council to adopt resolution 1409. This vote puts in place a new export control system for exports to Iraq—a major achievement that has been under negotiation since the beginning of last year. This unanimous decision reaffirms the broad consensus on Iraq within the Security Council that re-emerged last November when the Council passed resolution 1382. With resolution 1409, the Council has agreed that firm, focused controls must stay in place to prevent Iraq from re-establishing its conventional, ballistic missile, nuclear, chemical, and biological weapons programs. The need for such controls will remain until Iraq complies fully with all of its UN obligations.

Today's resolution demonstrates the Council's continued determination to meet the needs of the Iraqi people. The Council's new system, based on a "Goods Review List," effectively lifts UN controls on Iraq's ability to purchase and import civilian goods. This significant step will improve the Iraqi regime's ability to meet the needs of its people, unless Baghdad continues to subvert the Oil-for-Food program as it does today, to the detriment of the Iraqi people.

Finally, the Council's vote today reaffirms the responsibility of all states to fully enforce UN Security Council resolutions. The Iraqi regime represents a threat to its own people, its region and the international community. The U.S. intends to continue working with the UN and with our friends and coalition partners to enforce UN resolutions on Iraq vigorously. We expect every other nation to do the same. Under this new export control system, with its simple, expedited process for exporting civilian goods to Iraq, there can be no excuse for any country to evade the focused controls aimed at preventing the Iraqi regime's re-armament.

b. Revisions in UN Security Council Resolution 1454

On December 30, 2002, the UN Security Council adopted Resolution 1454, endorsing revisions to the Goods Review List. The items added to the revised list included chemicals and equipment useful in the production of chemical and biological weapons, medical autoinjectors that could be used in the event of a chemical weapons attack, guidance equipment and jammers with military applications, and specified medicines with particular value for chemical and biological warfare applications. Excerpts below from a fact sheet released by the Department of State on January 14, 2003, describe the effect of Resolution 1454.

The full text of the fact sheet is available at *http://usinfo.state.gov/regional/nea/iraq/text2003/0114list.htm*.

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When Resolution 1409 passed in May 2002, the Security Council envisioned that "regular, thorough reviews" of the List and the procedures for its implementation would occur, and that any necessary adjustments would be made. The Security Council has now carried out one such review and as a result has agreed to revisions to both the List and procedures. These changes, adopted in Security Council Resolution 1454 on December 30, 2002, reflect the will of the UN Security Council on how best to ensure the steady flow of purely civilian goods to the Iraqi people, while

maintaining critical controls on items that could be exploited for military uses by Saddam Hussein.

Resolution 1454 heightens the scrutiny over exports of a discrete set of goods that could support the Iraqi military and facilitate the development and use of weapons of mass destruction. Among the goods added to the revised GRL: specified chemicals and equipment useful in the production of chemical and biological weapons and their precursors; medical autoinjectors useful in the event of battlefield or terrorist chemical weapons use; guidance equipment and jammers with military applications; and other vehicles and related technology of value in particular military applications. Under certain conditions, specified medicines with particular value in chemical and biological warfare applications will also be reviewed.

Frequently Asked Questions

Q: Will the changes deny needed medicines to the Iraqi people?
A: No. The UN Sanctions Committee on Iraq will review requests for specified medications that have military use, when the requests are for quantities grossly in excess of any humanitarian civilian requirement. The United States opposes allowing the Iraqi military to stockpile quantities of certain medicines that could be used to protect its troops in the event Iraq used chemical or biological weapons.

Q: What other goods will be denied to the Iraqi population by the changes to the List?
A: The adopted changes do not automatically deny any item to the Iraqi people. The Goods Review List is not a denial list. Resolution 1454 simply calls for the UN Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) to refer items that have military applications to the Security Council for review.

Q: Will the changes to the List otherwise affect the import of civilian goods into Iraq?
A: The changes do not alter the objective of UNSC Resolution 1409, which created the present Goods Review List. The objective

was to streamline UN oversight of the export to Iraq of purely civilian goods, while maintaining critical controls on militarily useful items. By enhancing international confidence in the accuracy and effectiveness of controls on dual-use items, some known to have been misused by Iraq, the adopted revisions facilitate both the implementation of the Oil-for-Food Program and the import of civilian goods not subject to the Program.

Q: Will the changes in procedures delay the approval of contracts?
A: No. In fact, resolution 1454 underscored the Council's intention to ensure that needed humanitarian supplies reach the Iraqi population as rapidly as possible. This new resolution does not change the requirement for the evaluation of contracts for exports to Iraq. Under Resolution 1409, the UN Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA) conduct an initial evaluation of all export contracts submitted to the UN's Office of Iraq Programs. The procedural changes adopted under Resolution 1454 do, however, clarify the responsibilities of UNMOVIC and IAEA in making their evaluations, and minimize ambiguities in those deliberations.

3. Unblocking of Assets of the Federal Republic of Yugoslavia (Serbia & Montenegro)

On December 27, 2002, the Foreign Assets Control Office, Department of the Treasury, issued a final rule providing for general licenses, effective February 25, 2003, unblocking certain property and property interests currently blocked pursuant to two sets of regulations: the Federal Republic of Yugoslavia (Serbia & Montenegro) and Bosnian Serb-controlled areas of the Republic of Bosnia and Herzegovina Sanctions Regulations, 31 C.F.R. § 585 (2002), and the Federal Republic of Yugoslavia (Serbia & Montenegro) Kosovo Sanctions Regulations, 31 C.F.R. § 586 (2002). 67 Fed. Reg. 78,973 (Dec. 27, 2002). A statement from the Department of State explained the action as follows:

> The United States today has moved significantly closer to normalizing economic relations with all of the successor states of the former Yugoslavia by taking steps toward unblocking a substantial portion of the blocked assets of the former Yugoslavia (Socialist Federal Republic of Yugoslavia.) . . . These assets were blocked during the 1990s under a series of economic sanctions imposed by the United States in response to the Milosevic-era wars in the former Yugoslavia.
>
> The United States firmly believes that economic growth and foreign investment are critical to the economic recovery and political stability of each state in Southeastern Europe and the region as a whole. By unblocking these assets, the United States hopes to aid in improving the regional economic environment and fostering increased trade and investment in Southeastern Europe.

Press Statement, December 27, 2002, available at *www.state.gov/r/pa/prs/ps/2002/16238pf.htm*.

Excerpts below from the Federal Register notice explain the background and effect of the current action. See also *Digest 2001* at 803–808.

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Pursuant to Presidential Determination No. 96–7 of December 27, 1995 (61 FR 2887, January 29, 1996), and Executive Order 13192 of January 17, 2001 (66 FR 7379, Jan. 23, 2001), most Treasury-administered sanctions imposed upon the Federal Republic of Yugoslavia (Serbia & Montenegro) (the "FRY(S&M)") in response to the actions of the FRY(S&M) in Bosnia and Herzegovina from 1992 through 1995 and with respect to Kosovo from 1998 through 2000 have been suspended or lifted. Nevertheless, most property and interests in property blocked under either the Bosnia-related sanctions regulations (31 CFR part 585) or the Kosovo-related sanctions regulations (31 CFR part 586) have remained blocked, primarily to provide for the address of

claims and encumbrances that may be associated with such property or interests in property, including potential claims of the successor states of the former Socialist Federal Republic of Yugoslavia.

As part of the U.S. Government's efforts to assist the FRY(S&M) in recovering from the effects of the Milosevic regime, certain steps are being taken to unblock much of the remaining property and interests in property blocked under either 31 CFR part 585 or 31 CFR part 586. On October 3, 2001 (66 FR 50506), OFAC issued an interim final rule amending 31 CFR part 586, which included authorization for the unblocking of certain Yugoslav debt and authorization for the release of certain blocked financial transfers. At present, OFAC is issuing general licenses, effective February 25, 2003, authorizing the unblocking of all remaining blocked property and interests in property, except (i) property or interests in property of diplomatic and/or consular missions of the former Socialist Federal Republic of Yugoslavia, (ii) property or interests in property of those persons who are presently subject to sanctions under either the Federal Republic of Yugoslavia (Serbia & Montenegro) Milosevic Regulations set forth at 31 CFR part 587 or the Western Balkans Transactions Regulations set forth at 31 CFR part 588, or who are otherwise subject to sanctions under other parts of 31 CFR chapter V, and (iii) the property or interests in property of the central bank of the former Socialist Federal Republic of Yugoslavia, *i.e.*, the National Bank of Yugoslavia, that have been blocked pursuant to 31 CFR part 585. (Property and interests in property of the National Bank of Yugoslavia blocked pursuant to 31 CFR part 586 will be unblocked pursuant to the general license being issued at § 586.520.)

In order to allow for claims and encumbrances associated with the property and interests in property being unblocked to be addressed in a manner consistent with Presidential Determination No. 96–7 and Executive Order 13192, OFAC is also issuing general licenses, effective December 27, 2002, authorizing any person or government to seek judicial or other legal process with respect to property or interests in property being unblocked. These general licenses are intended to help persons and governments, including

the successor states to the former Socialist Federal Republic of Yugoslavia, to protect any rights they may have with respect to such property or interests in property. These general licenses do not constitute a determination that any particular property or interest in property subject to the unblocking authorization would not be subject to defenses against any judicial or legal process, including claims of immunity.

Cross References

Terrorism-related sanctions, **Chapter 3.B.1.a.-d.**
Legislation concerning use of blocked assets for terrorism claims, **Chapter 8.B.1.b.**
Non-proliferation sanctions, **Chapter 18.C.6.**

Chapter 17

International Conflict Resolution and Avoidance

A. GENERAL

Role of International Law in Resolving Conflict and Controlling Violence

On October 26, 2002, William H. Taft, IV, Legal Adviser of the Department of State, addressed the annual luncheon of the American Branch of the International Law Association in New York City during its 2002 annual international law weekend entitled "The Challenge of September 11: International Law and the Control of Violence." Mr. Taft's views, set forth below, addressed the evolving role of international law in controlling violence in the international arena as the international community responds to new challenges, particularly global terrorism.

Recently, a sniper, who appears to have selected his victims at random, has plagued the Washington area. The unpredictability of his attacks presented a unique challenge to law enforcement and reminds us of an unwelcome truth: when criminals act outside established norms, the effectiveness of traditional approaches to preventing crime is diminished, as law enforcement has to react to the last bad act, rather than be in a position to prevent the next incident.

Some of the traditional assumptions of basic police work—for example, that murder victims are killed because of who they are,

even if only that they fit a set of characteristics, or incidental to some other relatively well understood activity like robbing a bank—were inapplicable in this situation. New methods and ways of thinking have to be developed in these new circumstances.

International law and institutions have been similarly challenged in recent years. Most recently, international terrorists engaged in a random attack killing almost 200 people in the peaceful vacation destination of Bali, Indonesia. This attack was carried out by individuals, perhaps part of an organized criminal network operating on an international scale, but not likely connected to an organized state. Like other terrorist attacks—September 11, the embassy bombings in East Africa—this one stresses the international legal system.

What can international law do in this situation?

As a legal system, *international law* is traditionally turned to as a way to control violence among and between states. *National law* has been relied upon for prosecution of individuals, with the exception of the most heinous conduct—war crimes, genocide and crimes against humanity—that has been made the business of ad hoc international tribunals from time to time.

However, the events of 9/11 and the efforts of the world community to combat global terrorism since have blurred the lines between individual actor and organized network, organized network and recognized state. In the process, the distinction between national law enforcement and the use of force internationally—and the different laws regulating the conduct of these activities—has also been tested.

A review of the traditional institutions used to control violence in the international arena suggests four principal elements. . . .

First, there are the different fora available for peaceful resolution of international disputes. These can be either permanent courts, ad hoc tribunals or arbitration panels. The states of the European Union have a multi-lateral agreement to submit certain disputes among the member states to the E.U. Court of Justice and abide by its decisions. Similarly, the ICJ resolves disputes among member states to the United Nations where they have agreed to its jurisdiction. The U.S. is party also to several treaties calling for arbitration in the event of a disagreement between states. The

peaceful resolution of contentious disputes in these and similar fora is designed to prevent and has prevented many international conflicts from becoming violent. Even where conflict has begun, arbitration has sometimes brought it to an end.

Second, the United Nations and the United Nations Security Council specifically have responsibility for maintaining or restoring international peace and security. The Council encourages peaceful resolution of internal and external conflicts, engages in investigation and mediation between parties, and, when necessary, employs multi-national blue-helmeted troops to reduce tensions and keep opposing forces apart to create a calm from which peace may emerge.

East Timor and Kosovo provide recent examples of the Council's ability to control violence. Currently, the Council is providing interim law enforcement, critical administrative services, as well as internal and external security to assist the new democratically elected government in East Timor maintain stability and peace. In Kosovo, the UN is responsible for civilian administration.

Third, we should recall that international law recognizes the right of nation states to use force in self defense or threaten the use of force to deter aggression against them. These internationally approved rights discourage international conflict. States hesitate to initiate conflict knowing that opposing forces may legally resist them.

Nor, in the classical model, does international law abdicate its responsibility for controlling violence even when states resort to armed conflict. The laws of war and armed conflict comprise a fourth element of international law that regulates the use of force. Through the rules of necessity and proportionality, by providing for the protection of civilians and by providing members of opposing forces with certain protections and assurances, international law seeks to limit the effects of war and its most violent features.

In these four respects, as well as others that operate less directly, international law seeks to regulate the international conduct of states. With respect to individuals, international law has addressed only the most serious conduct, such as war crimes, genocides and

crimes against humanity. In extraordinary cases, individuals have previously been prosecuted through ad hoc tribunals like those established for the former Yugoslavia, Rwanda or Sierra Leone. Generally, however, individual cases have been seen as the responsibility of national courts, where the actor is prosecuted for a violation of a domestically defined crime. This has been the traditional division of labor.

The last year has exposed a tension in this classic model in several different ways, as we have sought to respond to the terrorist attacks of al Qaeda on September 11. Those attacks are clearly violations of domestic criminal laws and thus a proper subject of traditional law enforcement.

At the same time, however, al Qaeda operates on an international scale and it requires the use of military force to defend against it. In this situation, we have had to determine where law enforcement operations end and military operations, with their different rules of conduct, begin. We have had to make choices regarding which rules to apply and to whom. Definitions customarily used to guide such decisions have proved difficult to apply to a stateless entity such as al Qaeda as well as its individual members, who are nationals of states that are allied with us in the war against terrorism.

National law provides us with tools to seek out and prosecute particular actors for certain statutorily defined crimes. It also affords those suspected of crimes with certain rights—for example, not to be arrested and detained without charge—but 9/11 has shown us that we are not dealing simply with individual actors. Al Qaeda is a global organization with military capacity, an entity without an organized state, but one that exercised significant control over the Taliban regime in Afghanistan.

National law enforcement mechanisms are insufficient to deal with a multi-national militarized opponent. Military force is required, which moves us toward the application of the laws of armed conflict. These laws clearly authorize the detention of enemy combatants while hostilities continue—regardless of whether they are charged with criminal offenses. At the same time, they also permit lawful combatants to engage members of an opposing unit without incurring individual criminal liability.

But the question emerged, are members of al Qaeda lawful combatants? For a number of reasons, we have determined that they are not. The attacks on the World Trade Center and the Pentagon demonstrate al Qaeda's lack of regard for internationally agreed upon rules of combat.

Further, al Qaeda members lack a clearly distinctive identifier such as a uniform or insignia. They operate under a diffuse command structure with independent cells, who may or may not be aware of each other's existence. The command structure is not, in any case, intended to assure compliance with the laws of armed conflict, quite the opposite. These characteristics have led us to designate al Qaeda members as "unlawful combatants," in an international armed conflict. They may be criminals as well, but as "unlawful combatants" they do not enjoy the same rights as accused criminals until they are actually charged, and then they enjoy them only in connection with the operation of the criminal process.

Because of the different rules that apply in armed conflict, identifying the beginning or end of a conflict has become more important in the post 9/11 world at the same time it has become more challenging. While one might point to the tragedy of last fall as a starting point, the attack on the USS Cole off Yemen in 1998 or the coordinated bombings of our embassies in Dar es Salaam and Nairobi in 1997 may also be seen as part of the al Qaeda campaign. Indeed, the conflict may have begun with the first attempt on the World Trade Center in 1992.

At this point, however, it seems less important to know when the conflict with al Qaeda began than to determine when it will end. Historically, the cessation of hostilities has been marked by the signing of a peace treaty or, minimally, agreement to the terms of a cease-fire. However, neither event seems likely in the war on terrorism.

Perhaps the conclusion of the U.S. bombing campaign in Afghanistan and the subsequent regime change marked the end of a phase of the war, but when one considers the non-state nature of the opposition and the related terrorist activity that continues elsewhere, it becomes less clear. The recent attacks on U.S. marines in Kuwait and the bombing in Bali are evidence of the continuing nature of the conflict.

In general, the absence of a formal command system that would itself sanction continuation of hostilities by individual units makes the end of the conflict hard to establish. The issue is important, of course, because enemy combatants are not entitled to release under the laws of armed conflict until hostilities end. At that point, those not subject to criminal charges should be repatriated.

The difficulty of determining when a conflict ends helps to demonstrate the tension between law enforcement mechanisms and the laws of armed conflict. The two have very different objectives. The purpose of a law enforcement operation is to bring individuals to justice for a particular crime committed. An armed conflict arises out of an unsettled dispute, traditionally between two states, where one side seeks to stop the other from achieving a—usually political—objective. Because the interest in bringing individuals to justice is secondary under the laws of armed conflict, special protections for individual soldiers are generally adhered to by both sides. As you can see, then, we have had to address the tensions between rules governing law enforcement activity and those regulating armed conflict in the past year. We are still wrestling with some of them.

The last year has likewise presented difficult challenges to the U.N. Security Council in its role of maintaining international peace and security.

The Security Council responded swiftly and strongly to the events of 9/11. Resolution 1368, passed September 12, 2001, called on states to "redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of relevant international anti-terrorism conventions." The resolution also reaffirmed, in clear terms, the "inherent right of individual or collective self-defense." These actions signaled that the Council viewed a defensive use of force as a justified response to the tragedy. Responding to the Council's call, a coalition of nations moved forward to control the threat to peace and security posed by terrorist groups and the nations that host them.

However, the chapter remains to be written on how the Security Council addresses the situation in Iraq, and how that turns out will say a good deal about our ability to control violence through international law using that institution in the future.

For more than a decade, the U.N. has given the Iraqi regime opportunities to carry out its obligations under a series of resolutions. In addition to at least 30 U.N. Presidential statements deploring the unacceptable conduct of the Iraqi regime, the Security Council has passed 16 binding resolutions designed to stop Iraq from posing a threat to international peace and security. Iraq has violated each of them. The U.N. has also imposed strict economic sanctions upon Iraq. Iraq has circumvented each of them. The ability of the Council to control violence is diminished, perhaps beyond repair, if its resolutions are violated repeatedly without consequence.

The United States is continuing to work with the U.N. to approach this problem collectively even now, in the same way the global community came together after 9/11 to address a global threat to security. We hope that the next resolution by the Security Council addressing Iraq includes a clear delineation of the consequences of continued and future violations. How effectively the Council deals with Iraq will largely determine its effectiveness as an institution controlling violence for years to come.

Recently, international law has seen several creative attempts to control violence, and I would like to comment briefly on some of them. The consideration of new institutions and approaches is not in itself unwelcome. In some instances, however, it has the potential to undermine the abilities of the existing bodies. Perhaps the most widely publicized recent development is the establishment of the International Criminal Court by some seventy state parties to the Rome Statute. Whatever its virtues, this institution will regrettably complicate the work of the Security Council and individual states to control violence and diminish their effectiveness.

The I.C.C. was created to stand as a permanent international tribunal, charged with the prosecution of individuals for certain identified international crimes. In contrast, the Security Council is charged with maintaining peace and stability among states. Both institutions aim to control violence through the application of law. However, it is likely that their efforts in this regard may be inconsistent with each other. This is because the court acts independently of the Security Council—and indeed of any other political authority.

The unchecked authority given to the I.C.C. by the Rome Statute may undermine the role of the Security Council in maintaining international peace and security in several ways.

The court could interfere, for example, with the ability of a nation to address past wrongs in a domestic institution, such as the truth and reconciliation commissions in South Africa. It could interfere with the ability of the Council to intercede and establish tribunals that address the specific needs of a party or conflict in specially tailored ways, as has been done in Rwanda, Yugoslavia and Sierra Leone. Finally, the court could interfere with the ability of the Council to broker peace and maintain stability among states through mediation and compromise. An independent prosecutor may upset the delicate negotiating process without any supervision by the U.N.

The Rome Statute also purports to extend the court's jurisdiction beyond party states. Such an extension may inhibit the use of force in self-defense by non-party states. As previously discussed, the inherent right of self defense and even the threat of conflict are important elements in international law for the control of violence.

If the I.C.C. prosecutor and judges undertake to review the security decisions of non-party states, however, the court could have a chilling effect on the willingness of states to take steps to defend their security interests for fear of later prosecution. This could in turn encourage aggression.

Those establishing the court evidently think that the court's insulation from political control is a benefit in this regard. But if the prosecutor and judges themselves have political views and act on them, the insulation will prove a serious defect. The story of the sorcerer's apprentice is instructive.

Finally, the purported extension of jurisdiction to non-party states complicates traditional U.N. Security Council peacekeeping missions that include personnel from those states. The United States believes that by putting U.S. officials, and our uniformed women and men, at risk of politicized prosecutions, the I.C.C. will inhibit U.S. military cooperation with friends and allies who may, in certain circumstances and in the absence of special agreements we are in the process of negotiating, now have a treaty obligation to

hand over U.S. nationals to the I.C.C. when requested, even over U.S. objection. The United States is a large and often critically important contributor of troops in support of peacekeeping missions worldwide. While the U.N. has requested a one-year waiver from I.C.C. jurisdiction for persons participating in peacekeeping missions authorized by the Security Council, the extension of jurisdiction to non-party states still raises significant concerns for such missions in the future.

Another recent development in international law somewhat related to the Rome Statute has been the proliferation of national criminal and civil statutes of universal application. Many see this as a way to enforce international humanitarian law through national courts; however, such statutes can act to undermine the efforts of other institutions and laws designed to maintain peace and stability.

In 1999, Belgium extended previous universal competence laws, with the intention of granting its courts jurisdiction over additional crimes, regardless of the location of the crime or the alleged criminal actor. The Belgians used this law to secure convictions of four Rwandans, resident in Belgium, for crimes connected to the 1994 Rwandan genocide. In 2002, the International Court of Justice narrowed the reach of Belgian law, ruling that sitting ministers of foreign nations were immune from prosecution in Belgian courts. . . .

Today, the Belgian parliament again has under consideration a bill that would extend its criminal laws to any actor, regardless of where the alleged criminal incident occurred. Other states are considering similar laws. However well meaning these statutes may be, they suffer from many of the same faults discussed earlier in the context of the I.C.C. without a defined system of checks and balances, prosecutions under these and similar laws would be subject to politicization. Like the I.C.C., without supervision, prosecutions in this court can undermine sensitive political agreements, designed to bring about or maintain a fragile peace, as well as make it more difficult to reach such agreements in the first place.

In the civil area, the Alien Tort Statute has been used increasingly to provide a U.S. forum in which international victims of human rights abuses can seek redress from the abusers. While

many lawsuits brought under their statute have served to call attention to situations in which persons or groups have been dreadfully treated—and this, indeed, may have been the principal objective of several plaintiffs—the effectiveness of these lawsuits in controlling violence is questionable.

Nor do they tend to produce much compensation for the victims of abuse, although some lawyers have prospered from settlements. There are quite a few of these suits pending, and it remains to be seen how they will work out. Speaking for myself, however, I would say, from what I have seen of them, that whatever the merits of the suits as a matter of tort law, the likelihood that civil litigation in U.S. courts will contribute significantly to the solution of human rights abuses in foreign lands seems small.

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These are just a few of the issues that have arisen over the past year in the field of international law as we seek to resolve conflict and control violence. As you can see, the traditional model has been stressed as it has been applied to new situations. Some new ideas are being tried out. As new ideas and approaches are tried out, traditional institutions will continue to redefine and reassert their roles. With the number of issues facing the global community today, there will certainly be more to talk of next year.

B. SPECIFIC COUNTRIES AND REGIONS

1. Middle East

a. Statement by President Bush

In a speech delivered at the White House on June 24, 2002, President George W. Bush announced a plan for a path to peace in the Middle East. Excerpts of the speech provided below set forth his vision of Israelis and Palestinians in "two states, living side by side in peace and security."

The full text is available at *www.whitehouse.gov/news/releases/2002/06/20020624-3.html.*

For too long, the citizens of the Middle East have lived in the midst of death and fear. The hatred of a few holds the hopes of many hostage. The forces of extremism and terror are attempting to kill progress and peace by killing the innocent. And this casts a dark shadow over an entire region. For the sake of all humanity, things must change in the Middle East.

It is untenable for Israeli citizens to live in terror. It is untenable for Palestinians to live in squalor and occupation. And the current situation offers no prospect that life will improve. Israeli citizens will continue to be victimized by terrorists, and so Israel will continue to defend herself.

In the situation the Palestinian people will grow more and more miserable. My vision is two states, living side by side in peace and security. There is simply no way to achieve that peace until all parties fight terror. Yet, at this critical moment, if all parties will break with the past and set out on a new path, we can overcome the darkness with the light of hope. Peace requires a new and different Palestinian leadership, so that a Palestinian state can be born.

I call on the Palestinian people to elect new leaders, leaders not compromised by terror. I call upon them to build a practicing democracy, based on tolerance and liberty. If the Palestinian people actively pursue these goals, America and the world will actively support their efforts. If the Palestinian people meet these goals, they will be able to reach agreement with Israel and Egypt and Jordan on security and other arrangements for independence.

And when the Palestinian people have new leaders, new institutions and new security arrangements with their neighbors, the United States of America will support the creation of a Palestinian state whose borders and certain aspects of its sovereignty will be provisional until resolved as part of a final settlement in the Middle East.

In the work ahead, we all have responsibilities. The Palestinian people are gifted and capable, and I am confident they can achieve a new birth for their nation. A Palestinian state will never be created by terror—it will be built through reform. And reform must be more than cosmetic change, or veiled attempt to preserve the status quo. True reform will require entirely new political and

economic institutions, based on democracy, market economics and action against terrorism.

Today, the elected Palestinian legislature has no authority, and power is concentrated in the hands of an unaccountable few. A Palestinian state can only serve its citizens with a new constitution which separates the powers of government. The Palestinian parliament should have the full authority of a legislative body. Local officials and government ministers need authority of their own and the independence to govern effectively.

The United States, along with the European Union and Arab states, will work with Palestinian leaders to create a new constitutional framework, and a working democracy for the Palestinian people. And the United States, along with others in the international community will help the Palestinians organize and monitor fair, multi-party local elections by the end of the year, with national elections to follow.

Today, the Palestinian people live in economic stagnation, made worse by official corruption. A Palestinian state will require a vibrant economy, where honest enterprise is encouraged by honest government. The United States, the international donor community and the World Bank stand ready to work with Palestinians on a major project of economic reform and development. The United States, the EU, the World Bank, the International Monetary Fund are willing to oversee reforms in Palestinian finances, encouraging transparency and independent auditing.

And the United States, along with our partners in the developed world, will increase our humanitarian assistance to relieve Palestinian suffering. Today, the Palestinian people lack effective courts of law and have no means to defend and vindicate their rights. A Palestinian state will require a system of reliable justice to punish those who prey on the innocent. The United States and members of the international community stand ready to work with Palestinian leaders to . . . establish, finance and monitor a truly independent judiciary.

Today, Palestinian authorities are encouraging, not opposing, terrorism. This is unacceptable. And the United States will not support the establishment of a Palestinian state until its leaders engage in a sustained fight against the terrorists and dismantle

their infrastructure. This will require an externally supervised effort to rebuild and reform the Palestinian security services. The security system must have clear lines of authority and accountability and a unified chain of command.

America is pursuing this reform along with key regional states. The world is prepared to help, yet ultimately these steps toward statehood depend on the Palestinian people and their leaders. If they energetically take the path of reform, the rewards can come quickly. If Palestinians embrace democracy, confront corruption and firmly reject terror, they can count on American support for the creation of a provisional state of Palestine.

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Israel also has a large stake in the success of a democratic Palestine. Permanent occupation threatens Israel's identity and democracy. A stable, peaceful Palestinian state is necessary to achieve the security that Israel longs for. So I challenge Israel to take concrete steps to support the emergence of a viable, credible Palestinian state.

As we make progress towards security, Israel forces need to withdraw fully to positions they held prior to September 28, 2000. And consistent with the recommendations of the Mitchell Committee, Israeli settlement activity in the occupied territories must stop.

The Palestinian economy must be allowed to develop. As violence subsides, freedom of movement should be restored, permitting innocent Palestinians to resume work and normal life. Palestinian legislators and officials, humanitarian and international workers, must be allowed to go about the business of building a better future. And Israel should release frozen Palestinian revenues into honest, accountable hands.

I've asked Secretary Powell to work intensively with Middle Eastern and international leaders to realize the vision of a Palestinian state, focusing them on a comprehensive plan to support Palestinian reform and institution-building.

Ultimately, Israelis and Palestinians must address the core issues that divide them if there is to be a real peace, resolving all claims and ending the conflict between them. This means that the Israeli

occupation that began in 1967 will be ended through a settlement negotiated between the parties, based on U.N. Resolutions 242 and 338, with Israeli withdrawal to secure and recognized borders.

We must also resolve questions concerning Jerusalem, the plight and future of Palestinian refugees, and a final peace between Israel and Lebanon, and Israel and a Syria that supports peace and fights terror.

All who are familiar with the history of the Middle East realize that there may be setbacks in this process. Trained and determined killers, as we have seen, want to stop it. Yet the Egyptian and Jordanian peace treaties with Israel remind us that with determined and responsible leadership progress can come quickly.

As new Palestinian institutions and new leaders emerge, demonstrating real performance on security and reform, I expect Israel to respond and work toward a final status agreement. With intensive effort by all, this agreement could be reached within three years from now. And I and my country will actively lead toward that goal.

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b. General Assembly resolutions on Israeli-Palestinian conflict

On December 3, 2002, the United States voted against UN General Assembly resolutions addressing the Israeli-Palestinian conflict. In explaining the U.S. vote in both cases, U.S. spokesmen stressed that the United States remained engaged in the effort to resolve the conflict. As to Jerusalem, Richard Erdman, U.S. Senior Adviser, explained that "[t]he resolution on Jerusalem this year seeks to impose specific terms on the issue of Jerusalem which Israelis and Palestinians have agreed will be addressed in their final status negotiations. The United States objects to this intrusion by the General Assembly into the negotiations."

Excerpts below from remarks by Ambassador John Negroponte to the General Assembly explain the U.S. objections to resolutions that the United States views as attempting to prejudge issues that are the subject of negotiations between the parties.

Ambassador Negroponte's remarks are available at *www.un.int/usa/02print_207.htm.*

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The United States remains firmly committed to achieving a just and lasting peace in the Middle East. The recent upsurge in violence in the region is deeply troubling to us. We have repeatedly urged both sides to take immediate steps to ease the situation and refrain from words and actions that inflame tensions and complicate efforts to find peaceful solutions that allow the peoples of the region to live in peace, security and dignity.

The goal of the United States is to end all violence and terror in the region and to lay out a path to end the occupation that began in 1967. In working toward this goal, the United States is closely engaged with the Israelis and Palestinians, regional leaders, our Quartet partners, and the International Task Force on Reform. We believe a negotiated final settlement can be accomplished in three years.

The centerpiece of our current efforts is a roadmap designed to help promote practical efforts to achieve four objectives: 1) to implement the strategy of promoting Palestinian institutional and security reform; 2) to ease the humanitarian situation inside Palestinian areas; 3) to end violence and terror and restore security cooperation; and 4) to restore a political dialogue that would realize President Bush's vision of a final settlement based on two states living side-by-side in peace and security. The roadmap we are discussing will clearly lay out obligations and responsibilities on all sides. Progress from one phase to another would be performance-based.

This strategy and the roadmap are based on relevant U.N. Security Council Resolutions, President Bush's speech of June 24, and the Arab League Beirut Summit Initiative. They also seek to incorporate the Madrid "terms of reference" and previous agreements between the parties. The approach is aimed at a comprehensive peace with "security for all states of the region," as called for in the Beirut Summit Declaration.

We would welcome a resolution under this agenda item that reflected a balanced and pragmatic approach consistent with that of the Quartet. Unfortunately, it appears that we will be considering texts that put this body in the position of attempting to prejudge the settlement of the question of Jerusalem and other final status issues. To achieve a lasting peace, these issues must be decided through negotiations between the parties, consistent with their past agreements and consistent with relevant Security Council resolutions.

c. Joint Statement by the Quartet

On December 20, 2002, high-level representatives of the United States, the United Nations, the European Union and Russia issued a joint statement, following meetings in New York, on their efforts to address the conflict in the Middle East. The group, known as the Quartet, had been meeting for several years in an effort to revitalize the peace process in the Israeli-Palestinian conflict. The joint statement, providing their perspective on the path for resolution of the conflict, is set forth below.

The text is available at *www.state.gov/r/pa/prs/ps/2002/16168pf.htm*.

United Nations Secretary-General Kofi Annan, Russian Foreign Minister Igor Ivanov, U.S. Secretary of State Colin L. Powell, Danish Foreign Minister Per Stig Moeller, High Representative for European Common Foreign and Security Policy Javier Solana and European Commissioner for External Affairs Chris Patten met in New York today. The Quartet members reviewed the situation in the Middle East and agreed to continue close consultations, as expressed in the Madrid Declaration, to which the Quartet remains fully committed, to promote a just, comprehensive, and lasting settlement of the Middle East conflict. The Quartet expresses its support for the convening of a further international Ministerial meeting at an appropriate time.

The Quartet deeply deplores today's tragic killing of Israeli civilians and reiterates its strong and unequivocal condemnation of terrorism, including suicide bombing, which is morally repugnant and has caused great harm to the legitimate aspirations of the Palestinian people for a better future. Terrorists must not be allowed to kill the hope of an entire region, and a united international community, for genuine peace and security for both Palestinians and Israelis. The Quartet expresses once again its profound regret at the loss of innocent Israeli and Palestinian lives, and extends its sympathy to all those who have suffered loss. The Quartet members expressed their increasing concern about the mounting humanitarian crisis in Palestinian areas and their determination to address urgent Palestinian needs.

Consistent with President Bush's June 24 statement, the UN, EU and Russia express their strong support for the goal of achieving a final Israeli-Palestinian settlement which, with intensive effort on security and reform by all, could be reached within three years from now. The UN, EU and Russia welcome President Bush's commitment to active U.S. leadership toward that goal. The Quartet remains committed to implementing the vision of two states, Israel and an independent, viable and democratic Palestine, living side by side in peace and security, as affirmed by UN Security Council Resolution 1397. The Quartet members, in their individual capacity and jointly, pledge all possible efforts to realize the goals of reform, security and peace and reaffirm that progress in the political, security, economic, humanitarian, and institution-building fields must proceed together, hand-in-hand. The Quartet reiterates its welcome of the initiative of Saudi Arabia, endorsed by the Arab League Beirut Summit, as a significant contribution towards a comprehensive peace.

To assist progress toward these shared goals, the Quartet agreed on the importance of a coordinated international campaign to support Palestinian efforts at political and economic reform. The Quartet welcomes and encourages the strong Palestinian interest in fundamental reform, including the Palestinian 100-Day Reform Program. It also welcomes the willingness of regional states and the international community to assist the Palestinians to build institutions of good government, and to create a new governing

framework of working democracy, in preparation for statehood. For these objectives to be realized, it is essential that well-prepared, free, open and democratic elections take place. The new international Task Force on Reform, which is comprised of representatives of the U.S., EU, UN Secretary General, Russia, Japan, Norway, the World Bank and the International Monetary Fund, and which works under the auspices of the Quartet, will strive to develop and implement a comprehensive action plan for reform. The inaugural meeting of this Task Force in London July 10 discussed a detailed plan including specific Palestinian commitments. It will meet again in August to review actions in areas including civil society, financial accountability, local government, the market economy, elections, and judicial and administrative reform.

Implementation of an action plan, with appropriate benchmarks for progress on reform measures, should lead to the establishment of a democratic Palestinian state characterized by the rule of law, separation of powers, and a vibrant free market economy that can best serve the interests of its people. The Quartet also commits itself to continuing to assist the parties in efforts to renew dialogue, and welcomes in this regard the recent high-level ministerial meetings between Israelis and Palestinians on the issues of security, economics and reform.

The Quartet agreed on the critical need to build new and efficient Palestinian security capabilities on sound bases of unified command, and transparency and accountability with regard to resources and conduct. Restructuring security institutions to serve these goals should lead to improvement in Palestinian security performance, which is essential to progress on other aspects of institutional transformation and realization of a Palestinian state committed to combating terror.

In this context, the Quartet notes Israel's vital stake in the success of Palestinian reform. The Quartet calls upon Israel to take concrete steps to support the emergence of a viable Palestinian state. Recognizing Israel's legitimate security concerns, these steps include immediate measures to ease the internal closures in certain areas and, as security improves through reciprocal steps, withdrawal of Israeli forces to their pre-September 28, 2000

positions. Moreover, frozen tax revenues should be released. In this connection, a more transparent and accountable mechanism is being put into place. In addition, consistent with the Mitchell Committee's recommendations, Israel should stop all new settlement activity. Israel must also ensure full, safe and unfettered access for international and humanitarian personnel.

The Quartet reaffirms that there must be a negotiated permanent settlement based on UN Security Council resolutions 242 and 338. There can be no military solution to the conflict; Israelis and Palestinians must address the core issues that divide them, through sustained negotiations, if there is to be real and lasting peace and security. The Israeli occupation that began in 1967 must end, and Israel must have secure and recognized borders. The Quartet further reaffirms its commitment to the goal of a comprehensive regional peace between Israel and Lebanon, and Israel and Syria, based upon Resolutions 242 and 338, the Madrid terms of reference, and the principle of land for peace.

The Quartet looks forward to upcoming consultations with the Foreign Ministers of Jordan, Egypt, Saudi Arabia, and other regional partners, and determines to continue regular consultation on the situation in the Middle East at the principals' level. The Quartet envoys will continue their work on the ground to support the work of the principals, to assist the Task Force on Reform, and to aid the parties in resuming a political dialogue in order to reach a solution to the core political questions.

2. Sudan

a. Proposals by Special Envoy

On September 6, 2001, President Bush appointed former Senator John Danforth as Special Envoy for Peace in the Sudan. Senator Danforth described his mission as follows:

> The civil war in Sudan has lasted at least 18 years, and it has caused immense human misery—the death of two million people, bombing and displacement of civilians, trading in human beings as slaves. In appointing me

> special envoy, President Bush has asked me to determine if there is anything useful the U.S. can do to help end the misery in Sudan, in addition to what we are already doing on the humanitarian side. . . . [T]he possibility of peace depends on the will of combatants, not on the actions of even the best-intentioned outsiders, including the United States. Perhaps America can encourage peace; we cannot cause it.

Available at *www.whitehouse.gov/news/releases/2001/09/20010906-3.html*.

In a press briefing of November 27, 2001, Special Envoy Danforth outlined four proposals he had presented in his then recent trip to Sudan.

> The four proposals—the first is, and really the one we always list first is, is Nuba Mountains. . . . [T]he object of our proposal is to make . . . the Nuba Mountains available for humanitarian relief, without military action interfering with that relief.
>
> The second proposal is to create zones and times of tranquility, so that for specific dates at specific places, those places could be available for humanitarian efforts, particularly immunizations.
>
> The third is a cessation of bombing or shelling of civilian populations.
>
> And the fourth is the cessation of the taking of abductees, the slave trade.

Available at *www.state.gov/p/af/rls/spbr/2001/6399.htm*.

On January 19, 2002, the Government of the Republic of Sudan and the Sudan Peoples' Liberation Movemement/Nuba signed the Nuba Mountains Cease-Fire Agreement. *See www.defenselink.mil/policy/isa/africa/commission/deftext.doc.* The United States and the Swiss Confederation signed the agreement as witnesses. Article 1 of the agreement provided:

> The Parties agree to an internationally monitored cease-fire among all their forces in the Nuba Mountains for a renewable period of six(6) months with the broader

objectives of promoting a just, peaceful and comprehensive settlement of the conflict.

Article VII provided for the establishment of a Joint Military Commission ("JMC") "to assist in the disengagement and redeployment of the combatants and maintaining the cease-fire in accordance with the terms of this Agreement." The JMC would be composed of three representatives from each party and a neutral chairman with two vice-chairmen. Article VIII provided for the establishment of an International Monitoring Unit ("IMU") "to assist the Parties in implementing this Agreement and maintaining the cease-fire," working in collaboration with the JMC. International monitoring commenced in the spring of 2002 and continued throughout the year with funding, personnel and other support from several countries. The agreement was renewed by the Parties in July, 2002 for another six months.

In the spring of 2002, the Government of the Republic of Sudan and the Sudan People's Liberation Movement also signed an Agreement to protect noncombatant civilians and civilian facilities from military attack. In article 1, paragraph 1 of this agreement, these Parties reconfirmed "their obligations under international law, including common article 3 of the 1949 Geneva Conventions, to take constant care to protect the civilian population, civilians and civilian objects against the dangers arising from military operations." In this context, the Parties specifically committed themselves, inter alia, "to refrain from targeting or intentionally attacking non-combatant civilians." Article 1, paragraph 2 provided for "the establishment of a Verification Mission to investigate, evaluate and report on alleged incidents involving serious violations of their obligations or commitments described in paragraph 1." Other provisions of the agreement set forth details concerning the mandate, organization and other aspects of the Verification Mission. The Verification Mission, referred to as the Civilian Protection Monitoring Team, began operations in the Fall of 2002.

For additional information concerning the Danforth proposals and their implementation, see the Report to the

President of the United States on the Outlook for Peace in Sudan from John C. Danforth, Special Envoy for Peace, April 26, 2002, at *www.state.gov/documents/organization/10258.pdf*. *See also* Report of the International Eminent Persons Group on Slavery, Abduction and Forced Servitude in Sudan, May 22, 2002, at *www.state.gov/p/af/rls/rpt/10445.htm*.

b. Sudan Peace Act

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* 38 WEEKLY COMP. PRES. DOC. 1819 (Oct. 28, 2002). A fact sheet released by the Department of State on October 15, 2002, excerpted below, described the provisions of the Act.

The fact sheet is available at *http://usinfo.state.gov/regional/af/a2102101.htm*.

The Sudan Peace Act passed the U.S. House of Representatives on October 7, 2002 by a vote of 359–8. The Senate passed the same language by unanimous consent on October 9, 2002. The Act:

—Seeks to facilitate a comprehensive solution to the war in Sudan based on the Declaration of Principles of July 20, 1994 and the Machakos Protocol of July 2002.—Commends the efforts of the President's Special Envoy for Peace in Sudan, Senator Danforth, and his team.—Calls for: multilateralization of economic and diplomatic tools to compel Sudan to enter into a good faith peace process; support for democratic development in areas of Sudan outside government control; continued support for people-to-people reconciliation in non-government-controlled areas; strengthening of humanitarian relief mechanisms; and multilateral cooperation toward these ends.—Condemns violations of human rights on all sides of the conflict; the government's human rights record; the slave trade; government use of militia and other forces to support slave raiding; and aerial bombardment of civilian targets.

Funding Authorized for Use in Areas Outside Sudan Government Control

The Act authorizes to be appropriated $100 million for each of the fiscal years 03,04, and 05 for assistance to areas outside government control to prepare the population for peace and democratic governance, including support for civil administration, communications infrastructure, education, health, and agriculture.

Certifications and Actions

The U.S. President must certify within 6 months of enactment, and each 6 months thereafter, that the Sudan Government and the Sudan People's Liberation Movement are negotiating in good faith and that negotiations should continue. If, under this provision, 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 the following measures:

—Seek a UN Security Council resolution for an arms embargo on the Sudanese government—Instruct U.S. executive directors to vote against and actively oppose loans, credits, and guarantees by international financial institutions—Take all necessary and appropriate steps to deny government access to oil revenues in order to ensure that the funds are not used for military purposes—Consider downgrading or suspending diplomatic relations.

If the Sudan People's Liberation Movement is found not to be negotiating in good faith, none of the above provisions shall apply to the Sudanese Government.

The Act also states that, if the President certifies that Sudan is not in compliance with the terms of a permanent peace agreement between the government and the Sudan People's Liberation Movement, then the President, after consultation with the Congress, shall implement the measures described above.

As with other similar provisions, these provisions will be construed in a manner consistent with the President's constitutional responsibility for the conduct of foreign relations.

Reporting Requirements

—Within six months of enactment and annually thereafter, a report by the Secretary of State on the Sudan conflict, to include: the status of Sudan's development and use of oil resources; description of the extent to which financing was secured in the U.S. or with involvement of U.S. citizens; estimates of the extent of government aerial bombardment; description of extent to which government or other forces have obstructed or manipulated humanitarian relief.—Quarterly report by the President on the status of the peace process if, at any time after the President makes a certification as specified, Sudan discontinues negotiations for 14 days.—Semiannual report by the Secretary of the Treasury describing U.S. steps to oppose loans, credits, or guarantees, if financing is given despite U.S. opposition.—Report by the President, within 45 days of taking action to deny the Sudan government access to oil revenues, providing a comprehensive plan for implementation.

Humanitarian Relief

—The President should seek to end Sudan veto power over and manipulation of United Nations humanitarian relief efforts carried out through Operation Lifeline Sudan.—The President should increase the use of agencies other than Operation Lifeline Sudan for humanitarian relief efforts in southern Sudan. Requires submission within ninety days of enactment of a report describing progress made to achieve this.—Requires development of a contingency plan to provide the greatest possible amount of U.S. and privately-donated relief to all affected areas of Sudan in the event that Sudan imposes a total, partial or incremental ban on Operation Lifeline Sudan air transport relief flights.

War Crimes

—Requires the Secretary of State to collect information about incidents which may constitute crimes against humanity, genocide, war crimes, and other violations of international humanitarian

law by all parties to the conflict.—Requires submission of a report from the Secretary of State within six months after enactment, and annually thereafter, on the information collected and any findings or determinations made, subject to protection of sensitive sources or other national security interests.

3. Eritrea/Ethiopia Boundary Commission

On April 15, 2002, the United States welcomed the delimitation of the border between Ethiopia and Eritrea through the Eritrea/Ethiopia Boundary Commission in The Hague. The United States also reiterated its commitment to facilitate the peace process between the two countries.

The press statement from the Department of State is set forth below in full, available at *www.state.gov/r/pa/prs/ps/2002/9390.htm.*

The announcement April 13 by the Ethiopia-Eritrea Boundary Commission in The Hague of the delimitation of the border between the two countries is a major achievement for the peace process. By accepting the decision, Eritrean President Isaias and Ethiopian Prime Minister Meles have taken another courageous step to forge a comprehensive and lasting peace between the two countries.

The United States remains committed to facilitate the peace process to its conclusion. To this end, we have donated funds to a United Nations Trust Fund established to help defray the cost of the delimitation and demarcation of the border, and we intend to make an additional contribution shortly. We encourage other countries to donate to this Fund and to take other steps to facilitate the peace process, so that the border can be demarcated rapidly.

The United States reiterates its strong support for the work of the United Nations Mission in Ethiopia and Eritrea (UNMEE), and for the efforts of Special Representative of the Secretary General Ambassador Legwaila Joseph Legwaila, who has worked

tirelessly to resolve problems between the former antagonists and to move the peace process forward.

4. Haiti

a. Adoption of OAS Resolutions 806 and 822

In 2002 the Organization of American States addressed what it characterized as "the continuing political crisis in Haiti." On January 16, 2002, the OAS adopted Resolution 806, responding to violent events in Haiti of July 28 and December 17, 2001. As explained in an address of October 30, 2002 by Ambassador Roger F. Noriega, U.S. Permanent Representative to the OAS:

> On July 28, simultaneous attacks on the National Police Academy and police stations in different parts of the country resulted in several deaths, including a number of police officers. On December 17, the national Palace was attacked and part of it briefly occupied by the attackers. Also that day, in a series of coordinated incidents in Port-au-Prince and other cities, attackers ransacked and burned the offices of opposition political parties, and damaged or destroyed the residences of some members of the opposition.

Excerpts below from Ambassador Noriega's address describe the provisions of Resolution 806, available at *www.oas.org/consejo/resolutions/res806.htm*, and of Resolution 822, available at *www.oas.org/OASpage/Haiti_situation/cpres822_02eng.htm*, adopted on September 4, 2002, as well as U.S. concerns with progress in implementation of those resolutions by Haiti.

The full text of Ambassador Noriega's address is available at *www.oas.org/library/mant_speech/speech.asp?sCodigo=02-0460.*

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. . . [D]espite all the resources the international community, including the United States, has devoted to assist the Haitian people—extraordinary problems persist.

This has not deterred our government from continuing to help the Haitian people, nor should it deter the international community from doing so. However, it does mean that we must speak openly about what these problems are and state frankly our views about how Haiti can best solve them.

And a candid, open discussion requires me to say that we have very serious concerns about the leadership of Jean Bertrand Aristide.

Let us start by looking at Haitian government efforts to comply with OAS Resolutions 806 and 822.

The record of Haitian government compliance with these resolutions thus far is frankly discouraging.

Resolution 806 was adopted January 16, 2002 by the OAS in direct response to the violent events of July 28 and December 17, 2001.

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These violent incidents last July and December substantially impeded efforts, led by the OAS, to broker an accord between Fanmi Lavalas and the opposition settling the dispute that followed the elections in May 2000. Resolution 806 called on the Haitian government to diligently pursue all efforts to restore a climate of security. In particular, Resolution 806 among other things required:

— completion of a thorough, independent inquiry into the events related to Dec. 17;
— prosecution of any person and dismissal, where appropriate, of any government official found to be complicit in the Dec. 17 violence;
— completion of a thorough inquiry into all politically-motivated crimes; and
— reparations for organizations and individuals who suffered damages as a direct result of the violence of Dec. 17.

The OAS subsequently adopted Resolution 822 on September 4, 2002. In doing so, it incorporated by reference the provisions

of Res. 806 and specifically reiterated the requirements of that resolution, as I have just described them. In addition, it incorporated new commitments made by the Haitian government, including:

— publishing a report on actions taken with respect to persons found to be implicated in the events of December 17;
— strengthening disarmament policies and programs; and
— implementing to the fullest extent possible recommendations on improving human rights and protecting the press, as made by the OAS Commission of Inquiry Report into the events of December 17.

Resolution 822 also called on the Haitian Government to ensure a climate of security and confidence with a view to establishing the conditions necessary for free and fair elections in 2003. It established November 4 as the date by which autonomous, credible, and neutral Provisional Electoral Council ["CEP"] should be formed.

The United States gave its full support to OAS Resolution 822. Indeed, along with Canada, CARICOM, and others, we were instrumental in facilitating negotiations that produced unanimous adoption of 822 at the OAS.

Full Haitian government compliance with Resolutions 806 and 822 is essential. November 4 is coming up fast. That is the date projected under Resolution 822 for formation of the Provisional Electoral Council. All concerned parties—the opposition, the international community, NGOs, and most importantly the Haitian people—are looking to the Haitian government for concrete progress as that date approaches.

Unfortunately, the Haitian government has not met its commitments.

The OAS did conduct an independent inquiry into the events of Dec. 17, and—yes—the Haitian government did cooperate in that effort. However, the government has yet to produce its own final report on Dec. 17 as required by Resolution 822 and has yet to initiate any prosecutions. Moreover, inquiries into politically motivated crimes are far from complete.

Finally, despite some fits and starts, reparations are yet to be paid in full to all parties.

The government's efforts to end impunity, a crucial part of 822, are a key barometer of its commitment to the rule of law. Unfortunately, in some important respects, the government seems to be losing ground in the fight against impunity.

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In another important area, the United States is deeply dissatisfied with counter-narcotics cooperation in Haiti, and very concerned about police involvement in trafficking.

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The current crop of some 870 cadets now training at the Police Academy offers the prospect of additional manpower for election security. The United States and the international community are willing to provide technical assistance to the police so it can play a proper role, under the supervision of a credible and neutral CEP, in providing security for elections in 2003.

Broader assistance for the HNP [Haitian National Police], aimed at creating a more professional and independent force, will depend on the Aristide government's political will in rooting out corruption and preventing politicization by respecting internal rules of the HNP regarding recruitment, promotions, and assignments.

Another crucial element for security—perhaps the most difficult of all—is disarmament. Progress on an effective plan is essential. The OAS Special Mission is prepared to work with the government on a priority basis to create and implement a plan, but no plan will work without firm Haitian government commitment.

* * * *

The primary responsibility for addressing Haiti's political and economic problems rests with the government of Haiti.

Now is the time for that government to live up to its commitments to fulfill the great promise of this creative and vibrant people, who have as much to claim to democracy and economic opportunity as any of us.

b. Status of implementation

On November 6, 2002, Ambassador Noriega noted the failure to establish the Provisional Electoral Council ("CEP") by the November 4 date projected under Resolution 822. Ambassador Noriega voiced the U.S. disappointment and stated that "we are also concerned that the formation of an independent, neutral and credible CEP be done properly and with participation by a diverse section of the Haitian people, as set forth in the OAS draft Initial Accord of June 12." Ambassador Noriega's comments are available at *www.oas.org/library/mant_speech/speech.asp?sCodigo=02-0462.*

In an address commenting on the First Report of the Secretary General to the Permanent Council on Implementation of Resolution 822, December 9, 2002, Ambassador Noriega reconfirmed U.S. commitment to democracy in Haiti and the process set forth in Resolution 822. Excerpts from his comments set forth below also reflect U.S. concerns about the continuing failure of the Government of Haiti to reach closure on the formation of the Provisional Electoral Council and about recent political violence.

The full text of Ambassador Noriega's comments can be found at. *www.oas.org/library/mant_speech/speech.asp?sCodigo=02-0486.*

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The United States is committed to democracy in Haiti and remains convinced that the path to this goal is clearly set forth in the commitments made in OAS Resolution 822, approved unanimously 95 days ago. Resolution 822 laid out a clear process for the Government of Haiti, with support from the OAS Special Mission, to promote a climate of security, strengthen the rule of law, and prepare for free and fair legislative and local elections in 2003.

The political violence of recent weeks, some of it committed with the direct support of the Government and its adherents, which has produced the failure to reach closure on formation of the Provisional Electoral Council (CEP), shows that the Government

has yet to fulfill its commitments. This is despite the unstinting efforts of the OAS Special Mission and other parties to provide guidance and mediation to facilitate any Government efforts.

We call on the Government of Haiti to act immediately to cease gang violence, to pay in full the reparations due for damages from the violence of December 17, 2001, and to dramatically improve the security climate, particularly for those Haitians trying to exercise their fundamental civil rights.

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Cross References

Rule of law, **Chapter 6.J.**
Development issues, **Chapter 6.D.**
Rewards for justice, **Chapter 3.C.1.a.**
Peacekeeping missions, **Chapter 3.C.2.b.**

Chapter 18

Use of Force and Arms Control

A. USE OF FORCE

1. Iraq

a. Congressional authorization of use of force against Iraq

On October 3, 2002, the U.S. Congress enacted, and 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 specifically authorized use of force to defend the national security of the United States against the continuing threat posed by Iraq and to enforce relevant UN Security Council resolutions regarding Iraq. Key sections of the joint resolution are provided below. The enactment of the War Powers Resolution, 50 U.S.C. §§ 1541–1548, referred to in § 3(c) of the joint resolution, is discussed in *Digest 1973* at 560–563.

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Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its

citizens from such an attack, combine to justify action by the United States to defend itself;

Whereas United Nations Security Council Resolution 678 (1990) authorizes the use of all necessary means to enforce United Nations Security Council Resolution 660 (1990) and subsequent relevant resolutions and to compel Iraq to cease certain activities that threaten international peace and security, including the development of weapons of mass destruction and refusal or obstruction of United Nations weapons inspections in violation of United Nations Security Council Resolution 687 (1991), repression of its civilian population in violation of United Nations Security Council Resolution 688 (1991), and threatening its neighbors or United Nations operations in Iraq in violation of United Nations Security Council Resolution 949 (1994);

Whereas in the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102–1 [1991]), Congress has authorized the President "to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolution 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677";

Whereas in December 1991, Congress expressed its sense that it "supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 687 as being consistent with the Authorization of Use of Military Force Against Iraq Resolution (Public Law 102–1)," that Iraq's repression of its civilian population violates United Nations Security Council Resolution 688 and "constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region," and that Congress, "supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 688";

Whereas the Iraq Liberation Act of 1998 (Public Law 105–338) expressed the sense of Congress that it should be the policy of the United States to support efforts to remove from power the current Iraqi regime and promote the emergence of a democratic government to replace that regime;

Whereas on September 12, 2002, President Bush committed the United States to "work with the United Nations Security Council to meet our common challenge" posed by Iraq and to

"work for the necessary resolutions," while also making clear that "the Security Council resolutions will be enforced, and the just demands of peace and security will be met, or action will be unavoidable";

Whereas the United States is determined to prosecute the war on terrorism and Iraq's ongoing support for international terrorist groups combined with its development of weapons of mass destruction in direct violation of its obligations under the 1991 cease-fire and other United Nations Security Council resolutions make clear that it is in the national security interests of the United States and in furtherance of the war on terrorism that all relevant United Nations Security Council resolutions be enforced, including through the use of force if necessary;

Whereas Congress has taken steps to pursue vigorously the war on terrorism through the provision of authorities and funding requested by the President 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, or harbored such persons or organizations;

Whereas the President and Congress are determined to continue to take all appropriate 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, or harbored such persons or organizations;

Whereas the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States, as Congress recognized in the joint resolution on Authorization for Use of Military Force (Public Law 107–40); and

Whereas it is in the national security interests of the United States to restore international peace and security to the Persian Gulf region: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * *

SEC. 2. SUPPORT FOR UNITED STATES DIPLOMATIC EFFORTS

The Congress of the United States supports the efforts by the President to—

(1) strictly enforce through the United Nations Security Council all relevant Security Council resolutions regarding Iraq and encourages him in those efforts; and
(2) obtain prompt and decisive action by the Security Council to ensure that Iraq abandons its strategy of delay, evasion and noncompliance and promptly and strictly complies with all relevant Security Council resolutions regarding Iraq.

SEC. 3. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES

(a) Authorization.—The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—
  (1) defend the national security of the United States against the continuing threat posed by Iraq; and
  (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.
(b) Presidential Determination.—In connection with the exercise of the authority granted in subsection (a) to use force the President shall, prior to such exercise or as soon thereafter as may be feasible, but no later than 48 hours after exercising such authority, make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that—
  (1) reliance by the United States on further diplomatic or other peaceful means alone either (A) will not adequately protect the national security of the United States against the continuing threat posed by Iraq or (B) is not likely to lead to enforcement of all relevant United Nations Security Council resolutions regarding Iraq; and

(2) acting pursuant to this joint resolution is consistent with the United States and other countries continuing to take the necessary actions against international terrorist and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.

(c) War Powers Resolution Requirements.—

(1) Specific statutory authorization.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) Applicability of other requirements.—Nothing in this joint resolution supersedes any requirement of the War Powers Resolution.

* * * *

b. UN Security Council resolution on Iraq

(1) Adoption of Security Council Resolution 1441

On November 8, 2002, the UN Security Council unanimously adopted Resolution 1441, proposed by the United Kingdom and the United States on the issue of Iraq. U.N. Doc. S/RES/1441(2002). The resolution 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 (U.N. Doc. S/RES/678 (1990)) to use "all necessary means" to uphold resolution 660 (U.N. Doc. S/RES/660(1990)) 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.

Key provisions of Resolution 1441, adopted under chapter VII of the UN Charter, are set forth below.

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Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq's failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991);

2. *Decides*, while acknowledging paragraph 1 above, to afford Iraq, by this resolution, a final opportunity to comply with its disarmament obligations under relevant resolutions of the Council; and accordingly decides to set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council;

3. *Decides* that, in order to begin to comply with its disarmament obligations, in addition to submitting the required biannual declarations, the Government of Iraq shall provide to UNMOVIC, the IAEA, and the Council, not later than 30 days from the date of this resolution, a currently accurate, full, and complete declaration of all aspects of its programmes to develop chemical, biological, and nuclear weapons, ballistic missiles, and other delivery systems such as unmanned aerial vehicles and dispersal systems designed for use on aircraft, including any holdings and precise locations of such weapons, components, subcomponents, stocks of agents, and related material and equipment, the locations and work of its research, development and production facilities, as well as all other chemical, biological, and nuclear programmes, including any which it claims are for purposes not related to weapon production or material;

4. *Decides* that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material

breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below;

5. *Decides* that Iraq shall provide UNMOVIC and the IAEA immediate, unimpeded, unconditional, and unrestricted access to any and all, including underground, areas, facilities, buildings, equipment, records, and means of transport which they wish to inspect, as well as immediate, unimpeded, unrestricted, and private access to all officials and other persons whom UNMOVIC or the IAEA wish to interview in the mode or location of UNMOVIC's or the IAEA's choice pursuant to any aspect of their mandates; further decides that UNMOVIC and the IAEA may at their discretion conduct interviews inside or outside of Iraq, may facilitate the travel of those interviewed and family members outside of Iraq, and that, at the sole discretion of UNMOVIC and the IAEA, such interviews may occur without the presence of observers from the Iraqi Government; and instructs UNMOVIC and requests the IAEA to resume inspections no later than 45 days following adoption of this resolution and to update the Council 60 days thereafter;

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8. *Decides* further that Iraq shall not take or threaten hostile acts directed against any representative or personnel of the United Nations or the IAEA or of any Member State taking action to uphold any Council resolution;

9. *Requests* the Secretary-General immediately to notify Iraq of this resolution, which is binding on Iraq; demands that Iraq confirm within seven days of that notification its intention to comply fully with this resolution; and demands further that Iraq cooperate immediately, unconditionally, and actively with UNMOVIC and the IAEA;

10. *Requests* all Member States to give full support to UNMOVIC and the IAEA in the discharge of their mandates, including by providing any information related to prohibited programmes or other aspects of their mandates, including on Iraqi attempts since 1998 to acquire prohibited items, and by recommending sites to be inspected, persons to be interviewed, conditions of such interviews, and data to be collected, the results of which shall be reported to the Council by UNMOVIC and the IAEA;

11. *Directs* the Executive Chairman of UNMOVIC and the Director-General of the IAEA to report immediately to the Council any interference by Iraq with inspection activities, as well as any failure by Iraq to comply with its disarmament obligations, including its obligations regarding inspections under this resolution;

12. *Decides* to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security;

13. *Recalls*, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations;

14. *Decides* to remain seized of the matter.

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(2) Explanation of U.S. vote

In response to the Security Council action, Ambassador John D. Negroponte, United States Permanent Representative to the United Nations, provided an explanation of the U.S. vote in favor of Resolution 1441, set forth below.

The text is available at *www.un.int/usa/02_187.htm*.

This Resolution (1441) constitutes the world community's demand that Iraq disclose and destroy its weapons of mass destruction.

On September 12, President Bush came to the General Assembly seeking to build an international consensus to counter Iraq's persistent defiance of the United Nations. Over a decade ago, after evicting Iraq from Kuwait, the Security Council determined that peace and security in the Persian Gulf region required that Iraq, verifiably, give up its weapons of mass destruction. The Council reached that decision because of Iraq's record of aggression against its neighbors and use of chemical and biological weapons. For eleven years, without success, we have tried a variety of ways, including diplomacy, inspections, and economic sanctions to obtain Iraqi compliance. By this Resolution, we are now united in trying

a different course. That course is to send a clear message to Iraq insisting on its disarmament in the area of weapons of mass destruction and delivery systems, or face the consequences.

The Resolution we have just adopted puts the conflict between Iraq and the United Nations in context and recalls the obligations on Iraq and the authorities of member states to enforce them. It begins by reference to Iraq's invasion of Kuwait in August of 1990 and the international community's response. It recalls that the cease-fire ending the 1991 Gulf War was conditioned on Iraq's disarmament with respect to nuclear, chemical, and biological weapons, together with their support infrastructures, ending its involvement in, and support for, terrorism, and its accounting for, and restoration of, foreign nationals and foreign property wrongfully seized. In addition, the Council demanded that the Iraqi Government stop oppressing the Iraqi people. Iraq has ignored those obligations essential to peace and security.

The Resolution confirms what has been clear for years: that Iraq has been and remains in violation of disarmament obligations—"material breach" in lawyers' language. The Council then decides to afford Iraq a final opportunity to comply. As a means to that end, the Resolution then establishes an enhanced, strengthened inspection regime. The Resolution gives UNMOVIC and the IAEA a new, powerful mandate. Its core is immediate and unimpeded access to every site, including Presidential and other Sensitive Sites, structure, or vehicle they choose to inspect and equally immediate and unimpeded access to people they wish to interview. In other words: "anyone, anywhere, any time." And, the Resolution gives UNMOVIC and the IAEA the power to do their work properly and to ensure the verifiable destruction of Iraq's weapons of mass destruction and associated infrastructure and support programs.

Let us be clear: the inspections will not work unless the Iraqi regime cooperates fully with UNMOVIC and the IAEA. We hope all member states now will press Iraq to undertake that cooperation. This resolution is designed to test Iraq's intentions: will it abandon its weapons of mass destruction and its illicit missile programs or continue its delays and defiance of the entire world? Every act of Iraqi non-compliance will be a serious matter, because it would tell us that Iraq has no intention of disarming.

As we have said on numerous occasions to Council members, this Resolution contains no "hidden triggers" and no "automaticity" with respect to the use of force. If there is a further Iraqi breach, reported to the Council by UNMOVIC, the IAEA, or a member state, the matter will return to the Council for discussions as required in paragraph 12. The Resolution makes clear that any Iraqi failure to comply is unacceptable and that Iraq must be disarmed. And one way or another, Mr. President, Iraq will be disarmed. If the Security Council fails to act decisively in the event of a further Iraqi violation, this resolution does not constrain any member state from acting to defend itself against the threat posed by Iraq, or to enforce relevant UN resolutions and protect world peace and security.

To the Government of Iraq, our message is simple: noncompliance no longer is an option. To our colleagues on the Security Council, our message is one of partnership: over seven weeks, we have built international consensus on how to proceed towards Iraq, and we have come together, recognizing that our collective security is at stake and that we must meet this challenge, as proposed by President Bush on September 12.

To the Secretary-General, Dr. Blix, and Dr. El-Baradei: We urge you to make full use of the tools given to you in this resolution, and we pledge our full support. And we urge every member of the United Nations to offer you all assistance possible.

To the governments and peoples of the Arab world, including the people of Iraq: the purpose of this Resolution is to open the way to a peaceful solution of this issue. That is the intention and wish of my government. When the Baghdad regime claims that the United States is seeking to wage war on the Arab world, nothing could be further from the truth. What we seek, and what the Council seeks by this Resolution, is the disarmament of Iraq's weapons of mass destruction. We urge you to join us in our common effort to secure that goal and assure peace and security in the region.

President Bush asked the Security Council to take on the challenge posed by Iraq. He asked that it find Iraq in material breach of its ongoing obligations, that it establish an enhanced inspection regime as a means for obtaining the disarmament

of Iraq in the area of weapons of mass destruction, and that it make clear that the most serious consequences for Iraq would follow continued defiance. This Resolution accomplishes each of these purposes. Moreover, it does so as a result of intense and open discussions with our Security Council partners. In this process, different views about the shape and language of a resolution were fused into the common approach our British partners and we wanted to create.

This Resolution affords Iraq a final opportunity. The Secretary-General said on September 12, "If Iraq's defiance continues, the Security Council must face its responsibilities." We concur with the wisdom of his remarks. Members can rely on the United States to live up to its responsibilities if the Iraq regime persists with its refusal to disarm.

(3) Iraqi violations of relevant resolutions

A fact sheet, issued on November 8, 2002, and excerpted below, summarized Iraqi violations of sixteen UN Security Council resolutions and enumerated relevant UN Security Council presidential statements.

The full text of the fact sheet is available at *www.state.gov/p/nea/rls/01fs/14906pf.htm*. The White House background paper from which it is excerpted, "A Decade of Deception and Defiance," is available at *www.state.gov/p/nea/rls/13456.htm*.

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Saddam Hussein's Defiance of United Nations Resolutions

Saddam Hussein has repeatedly violated sixteen United Nations Security Council Resolutions (UNSCRs) designed to ensure that Iraq does not pose a threat to international peace and security. In addition to these repeated violations, he has tried, over the past decade, to circumvent UN economic sanctions against Iraq, which are reflected in a number of other resolutions. As noted in the resolutions, Saddam Hussein was required to fulfill many obligations beyond the withdrawal of Iraqi forces from Kuwait. Specifically, Saddam Hussein was required to, among other things:

allow international weapons inspectors to oversee the destruction of his weapons of mass destruction; not develop new weapons of mass destruction; destroy all of his ballistic missiles with a range greater than 150 kilometers; stop support for terrorism and prevent terrorist organizations from operating within Iraq; help account for missing Kuwaitis and other individuals; return stolen Kuwaiti property and bear financial liability for damage from the Gulf War; and he was required to end his repression of the Iraqi people. **Saddam Hussein has repeatedly violated each of the following resolutions:**

UNSCR 678—November 29, 1990
Iraq must comply fully with UNSCR 660 (regarding Iraq's illegal invasion of Kuwait) "and all subsequent relevant resolutions."

Authorizes UN Member States "to use all necessary means to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area."

UNSCR 686—March 2, 1991
Iraq must release prisoners detained during the Gulf War.

Iraq must return Kuwaiti property seized during the Gulf War.

Iraq must accept liability under international law for damages from its illegal invasion of Kuwait.

UNSCR 687—April 3, 1991
Iraq must "unconditionally accept" the destruction, removal or rendering harmless "under international supervision" of all "chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities."

Iraq must "unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapons-usable material" or any research, development or manufacturing facilities.

Iraq must "unconditionally accept" the destruction, removal or rendering harmless "under international supervision" of all "ballistic missiles with a range greater than 150 KM and related major parts and repair and production facilities."

Iraq must not "use, develop, construct or acquire" any weapons of mass destruction.

Iraq must reaffirm its obligations under the Nuclear Non-Proliferation Treaty.

Creates the United Nations Special Commission (UNSCOM) to verify the elimination of Iraq's chemical and biological weapons programs and mandated that the International Atomic Energy Agency (IAEA) verify elimination of Iraq's nuclear weapons program.

Iraq must declare fully its weapons of mass destruction programs.

Iraq must not commit or support terrorism, or allow terrorist organizations to operate in Iraq.

Iraq must cooperate in accounting for the missing and dead Kuwaitis and others.

Iraq must return Kuwaiti property seized during the Gulf War.

UNSCR 688—April 5, 1991

"Condemns" repression of Iraqi civilian population, "the consequences of which threaten international peace and security."

Iraq must immediately end repression of its civilian population.

Iraq must allow immediate access to international humanitarian organizations to those in need of assistance.

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(4) Declaration by Iraq

Among other things, Resolution 1441 required Iraq to submit a "currently accurate, full and complete" declaration on all aspects of its weapons programs. On December 7, 2002, Iraq submitted a 12,200-page document in response to that requirement. On December 19, 2002, after reviewing the declaration, Secretary of State Colin L. Powell held a press conference on Iraq's declaration, excerpted below.

The full text of the press conference is available at *www.state.gov/secretary/rm/2002/16123pf.htm.*

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The inspectors told the Security Council this morning that the declaration fails to answer many open questions. They said that in some cases they even have information that directly contradicts Iraq's account.

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Most brazenly of all, the Iraqi declaration denies the existence of any prohibited weapons programs at all. The United States, the United Nations and the world waited for this declaration from Iraq. But Iraq's response is a catalogue of recycled information and flagrant omissions. It should be obvious that the pattern of systematic holes and gaps in Iraq's declaration is not the result of accidents or editing oversights or technical mistakes. These are material omissions that, in our view, constitute another material breach.

We are disappointed, but we are not deceived. This declaration is consistent with the Iraqi regime's past practices. We have seen this game again and again—an attempt to sow confusion and buy time, hoping the world will lose interest. This time, the game is not working. This time, the international community is concentrating its attention and increasing its resolve as the true nature of the Iraqi regime is revealed again.

On the basis of this declaration, on the basis of the evidence before us, our path for the coming weeks is clear.

First, we must continue to audit and examine the Iraqi declaration to understand the full extent of Iraq's failure to meet its disclosure obligations.

Second, the inspections should give high priority to conducting interviews with scientists and other witnesses outside of Iraq, where they can speak freely. Under the terms of Resolution 1441, Iraq is obligated—it is their obligation—to make such witnesses available to the inspectors.

Third, the inspectors should intensify their efforts inside Iraq. The United States, and I hope other Council members, will provide the inspectors with every possible assistance, all the support they need to succeed in their crucial mission. Given the gravity of the situation, we look forward to frequent reports from Dr. Blix and Dr. El Baradei.

Finally, we will continue to consult with our friends, with our allies, and with all members of the Security Council on how

to compel compliance by Iraq with the will of the international community.

But let there be no misunderstanding. As Ambassador John Negroponte said earlier today, Saddam Hussein has so far responded to this final opportunity with a new lie. The burden remains on Iraq. Not on the United Nations. Not on the United States. The burden remains on Iraq to cooperate fully and for Iraq to prove to the international community whether it does or does not have weapons of mass destruction. We are convinced they do until they prove to us otherwise.

Resolution 1441 calls for serious consequences for Iraq if it does not comply with the terms of the resolution. Iraq's noncompliance and defiance of the international community has brought it closer to the day when it will have to face these consequences. The 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. Iraq can no longer be allowed to threaten its people and its region with weapons of mass destruction. It is still up to Iraq to determine how its disarmament will happen. Unfortunately, this declaration fails totally to move us in the direction of a peaceful solution.

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A fact sheet released by the Department of State provides "illustrative examples of omissions" from the declaration. The U.S. concluded that "[n]one of these holes and gaps in Iraq's declaration are mere accidents, editing oversights or technical mistakes; they are material omissions." For the full text of the fact sheet *see www.state.gov/r/pa/prs/ps/2002/16118pf.htm.*

2. Preemptive Action in Self-Defense

a. National Security Strategy

In September 2002, President George W. Bush released the National Security Strategy of the United States of America.

Chapter V, excerpted below, concerns the threat of weapons of mass destruction ("WMD"). In addition to addressing the need for non-proliferation and arms control, chapter V discussed the preemptive use of force in response to threats from rogue states and terrorists.

The full text of the National Security Strategy is available at *www.whitehouse.gov/nsc/nss.html.*

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V. Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction

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The nature of the Cold War threat required the United States—with our allies and friends—to emphasize deterrence of the enemy's use of force, producing a grim strategy of mutual assured destruction. With the collapse of the Soviet Union and the end of the Cold War, our security environment has undergone profound transformation.

Having moved from confrontation to cooperation as the hallmark of our relationship with Russia, the dividends are evident: an end to the balance of terror that divided us; an historic reduction in the nuclear arsenals on both sides; and cooperation in areas such as counterterrorism and missile defense that until recently were inconceivable.

But new deadly challenges have emerged from rogue states and terrorists. None of these contemporary threats rival the sheer destructive power that was arrayed against us by the Soviet Union. However, the nature and motivations of these new adversaries, their determination to obtain destructive powers hitherto available only to the world's strongest states, and the greater likelihood that they will use weapons of mass destruction against us, make today's security environment more complex and dangerous.

In the 1990s we witnessed the emergence of a small number of rogue states that, while different in important ways, share a number of attributes. These states:

- brutalize their own people and squander their national resources for the personal gain of the rulers;
- display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are party;
- are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes;
- sponsor terrorism around the globe; and
- reject basic human values and hate the United States and everything for which it stands.

At the time of the Gulf War, we acquired irrefutable proof that Iraq's designs were not limited to the chemical weapons it had used against Iran and its own people, but also extended to the acquisition of nuclear weapons and biological agents. In the past decade North Korea has become the world's principal purveyor of ballistic missiles, and has tested increasingly capable missiles while developing its own WMD arsenal. Other rogue regimes seek nuclear, biological, and chemical weapons as well. These states' pursuit of, and global trade in, such weapons has become a looming threat to all nations.

We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends. Our response must take full advantage of strengthened alliances, the establishment of new partnerships with former adversaries, innovation in the use of military forces, modern technologies, including the development of an effective missile defense system, and increased emphasis on intelligence collection and analysis.

Our comprehensive strategy to combat WMD includes:

- *Proactive counterproliferation efforts.* We must deter and defend against the threat before it is unleashed. We must ensure that key capabilities—detection, active and passive defenses, and counterforce capabilities—are integrated into our defense transformation and our homeland security systems. Counterproliferation must also be integrated into the doctrine, training, and equipping of our forces and

those of our allies to ensure that we can prevail in any conflict with WMD-armed adversaries.

- *Strengthened nonproliferation efforts to prevent rogue states and terrorists from acquiring the materials, technologies, and expertise necessary for weapons of mass destruction.* We will enhance diplomacy, arms control, multilateral export controls, and threat reduction assistance that impede states and terrorists seeking WMD, and when necessary, interdict enabling technologies and materials. We will continue to build coalitions to support these efforts, encouraging their increased political and financial support for nonproliferation and threat reduction programs. The recent G-8 agreement to commit up to $20 billion to a global partnership against proliferation marks a major step forward.
- *Effective consequence management to respond to the effects of WMD use, whether by terrorists or hostile states.* Minimizing the effects of WMD use against our people will help deter those who possess such weapons and dissuade those who seek to acquire them by persuading enemies that they cannot attain their desired ends. The United States must also be prepared to respond to the effects of WMD use against our forces abroad, and to help friends and allies if they are attacked.

It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.

In the Cold War, especially following the Cuban missile crisis, we faced a generally status quo, risk-averse adversary. Deterrence was an effective defense. But deterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations.

- In the Cold War, weapons of mass destruction were considered weapons of last resort whose use risked the destruction of those who used them. Today, our enemies see weapons of mass destruction as weapons of choice. For rogue states these weapons are tools of intimidation and military aggression against their neighbors. These weapons may also allow these states to attempt to blackmail the United States and our allies to prevent us from deterring or repelling the aggressive behavior of rogue states. Such states also see these weapons as their best means of overcoming the conventional superiority of the United States.
- Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness. The overlap between states that sponsor terror and those that pursue WMD compels us to action.

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principal norms of the law of warfare. As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses would be exponentially more severe if terrorists acquired and used weapons of mass destruction.

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather. We will always proceed deliberately, weighing the consequences of our actions. To support preemptive options, we will:

- build better, more integrated intelligence capabilities to provide timely, accurate information on threats, wherever they may emerge;
- coordinate closely with allies to form a common assessment of the most dangerous threats; and
- continue to transform our military forces to ensure our ability to conduct rapid and precise operations to achieve decisive results.

The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.

b. Military intervention

William H. Taft, IV, Legal Adviser of the Department of State, set forth an analysis of the legal bases for military intervention, including preemptive action in self-defense, in remarks to a meeting of the American Society of International Law and the Bar of the City of New York on January 13, 2003. The prepared speaking points for Mr. Taft's remarks are provided below in full.

- Preemptive action in self-defense is not a novel concept.
- As far back as 1837, the British destroyed the *Caroline*, a U.S. steamer, not in response to a prior attack, but because they anticipated its use to support Canadian forces in their rebellion against the crown. Neither Secretary of State Daniel Webster nor British Foreign Minister Lord Ashburton disagreed about the existence of an inherent right to use force in self-defense, but rather on its application to the set of facts before them. Secretary Webster pointed out, "the extent of this right is a question to be judged by the circumstances of each particular case." The difficulty lies in determining, as Lord Ashburton asked, "when begins your right to self-defend."
- We have faced the issue more recently in the context of the Cuban Missile Crisis. President Kennedy spoke these words in 1962: "We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril."
- And as recently as our actions following the attacks of 9/11, United States action, with the cooperation of its allies, against Al Qaeda and the Taliban in the wake of the terrible attacks of 9/11 could be considered preemptive; the United States was not acting in retaliation, but actually, to prevent and deter imminent attack. Under this theory, the United States action was justified so long as the enemy maintained his capacity to attack.

U.N. CHARTER

- Article 51 of the United Nations Charter makes clear that "Nothing in the present charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a member of the United Nations."
- The United States has long held that, consistent with Article 51 and customary international law, a state may use force in self-defense: 1. if it has been attacked, or 2. if an armed attack is legitimately deemed to be imminent.

  This interpretation is also consistent with our domestic notion of self-defense as applied in the criminal and tort law contexts.

- The case is, without question, easier where there has been a clear attack or where there has been a direct authorization from the United Nations Security Council.
- Iraq is a case involving UN Security Council authorization, which I will discuss shortly.

WMD CONTEXT

- But short of an actual armed attack or a direct authorization from the Security Council, how long does a State have to wait before preemptive measures can be taken to prevent serious harm?
- In the era of weapons of mass destruction, definitions within the traditional framework of the use of force in self-defense and the concept of preemption must adapt to the nature and capabilities of today's threats.

Necessity

- Within the traditional framework of self-defense, a preemptive use of proportional force is justified only out of necessity.
- The concept of necessity includes: a credible, imminent threat and the exhaustion of peaceful remedies.

Imminence

- How far from an advancing army or ships on the horizon can one be removed and still view the situation as one where the enemy's preparation makes it necessary to view an attack as imminent?
- The purpose of the UN Charter's language preserving the inherent right of self-defense is to help dissuade states from taking aggressive action, but this purpose was based on the assumption that when a nation was attacked, it would be able to respond.
- The concept of armed attack and imminent threat must now take into account the capacity of today's weapons. The deterrent effect is diminished when the magnitude of the

first aggressive strike could destroy completely one's ability to respond.

- We cannot wait for a first strike under such circumstances.
- The inherent right of self-defense embodied in the UN Charter must include the right to take preemptive action; otherwise the original purpose is frustrated.
- While the definition of imminent must recognize the threat posed by weapons of mass destruction and the intentions of those who possess them, the decision to undertake any action must meet the test of necessity.

Israel Example as an Application of this Concept

- A more recent examination of a claim of the preemptive use of force in self-defense is Israel's destruction in June, 1981, of an Iraqi nuclear reactor near Baghdad.
- Israel asserted the attack was undertaken in self-defense, claiming that Iraq planned to use the reactor to build nuclear weapons for use against Israel.
- The United Nations Security Council unanimously condemned the act as an act of aggression in violation of the UN Charter.
- The majority of the debate centered on whether Israel's actions were a legitimate exercise of the right to self-defense—the "necessity" of Israel's actions.
- The Member Nations agreed that Israel had failed to exhaust all peaceful means for resolution of the conflict. (This was the sole reason given by the United States as an explanation for its conclusion that Israel had violated the Charter.)
- Nearly every member pointed to factual evidence that the Iraqi reactor was in full compliance, at the time, with its obligations under the Non-Proliferation Treaty.
- Many believed the threat was too tenuous, as the Iraqi facility would have required radical alteration to produce weapon components.
- Many viewed the rationale as an unlimited concept of self-defense against all possible future dangers, subjectively assessed. This would certainly have been a dangerous precedent to set, if permitted without "clear and absolute necessity." However,

the members had imposed limits by evaluating the individual circumstances of the situation against the tests of necessity and proportionality.

NATIONAL SECURITY STRATEGY

- In light of the incredible destructive capacity of weapons of mass destruction, the President's National Security Strategy clarifies that the United States reserves the right to use force preemptively in self-defense when faced with an imminent threat.
- The United States will always proceed deliberately, weighing the consequences of its actions.
- Of course, the simple fact that a state possesses significant military power or seeks to enhance it would not, in the absence of any evidence that it intends to use its power against others aggressively, justify a preemptive strike against it. The United States or any other nation should not use force to preempt every emerging threat or as a pretext for aggression.
- After the exhaustion of peaceful remedies and a careful, deliberate consideration of the consequences, in the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nationals from unimaginable harm.

IRAQ

- The confrontation with Iraq is taking place in the context of United Nations Security Council Resolutions and Security Council authorizations and as such, use of force against Iraq would not constitute a preemptive use of force.
- For more than a decade, the U.N. has given the Iraqi regime opportunities to carry out its obligations under a series of resolutions.
- Following Iraq's invasion of Kuwait in 1990, U.N. Security Council Resolution 660 condemned the invasion and demanded that Iraq withdraw.
- In 1991, Resolution 678 authorized the use of "all necessary means to uphold and implement resolution 660 and all

subsequent relevant resolutions and to restore international peace and security in the area."

- In addition to the resolutions I have mentioned, there have been at least 30 U.N. Presidential statements deploring the unacceptable conduct of the Iraqi regime, and the Security Council has passed 14 other binding resolutions designed to stop Iraq from posing a threat to international peace and security, including Resolution 687 of 1991, which set the conditions for the cease-fire. Iraq has violated each of them.
- The U.N. has also imposed strict economic sanctions upon Iraq. Iraq has circumvented each of them.
- In 2002, the Security Council unanimously passed Resolution 1441—giving Iraq a last chance to fulfill promises made and obligations incurred over the last decade.
- Pursuant to this latest resolution, UNMOVIC [United Nations Monitoring, Verification and Inspection Commission] and the IAEA [International Atomic Energy Agency] will make a report to the Security Council later this month.
- It will be seen that all of this has very little to do with self-defense or pre-emptive self-defense.

3. Military Commissions

a. Promulgation of procedures

On March 21, 2002, the Department of Defense issued Military Commission Order No. 1, providing procedures for trials by military commissions established pursuant to the military order issued by President Bush on November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001). The November order provided for the potential use of military commissions for trial of a non-U.S. citizen whom the President (1) determined there is reason to believe is or was a member of al Qaeda, or has participated in terrorist acts against the United States, or has harbored such individuals and (2) found that it is in the interest of the United States that such individual be subject to the order. *See Digest 2001* at 872–880. Military Order No. 1 is excerpted below.

A fact sheet describing the tribunals is available at *www.dtic.mil/whs/directives/corres/mco/mco1fact.pdf.* The full text of Military Commission Order No. 1 is available at *www.dtic.mil/whs/directives/corres/mco/mco1.pdf.*

Department of Defense
Military Commission Order No. 1

SUBJECT: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism

References:

(a) United States Constitution, Article II, section 2
(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F. R. 57833 (Nov. 16, 2001) (" President's Military Order")
(c) DoD 5200.2-R, "Personnel Security Program," current edition
(d) Executive Order 12958, "Classified National Security Information" (April 17, 1995, as amended, or any successor Executive Order)
(e) Section 603 of title 10, United States Code
(f) DoD Directive 5025.1, "DoD Directives System," current edition March 21, 2002

1. PURPOSE

This Order implements policy, assigns responsibilities, and prescribes procedures under references (a) and (b) for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the

Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this Order, the procedures prescribed herein and no others shall govern such trials.

2. ESTABLISHMENT OF MILITARY COMMISSIONS

In accordance with the President's Military Order, the Secretary of Defense or a designee ("Appointing Authority") may issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

3. JURISDICTION

A. Over Persons

A military commission appointed under this Order ("Commission") shall have jurisdiction over only an individual or individuals ("the Accused") (1) subject to the President's Military Order and (2) alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.

B. Over Offenses

Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.

C. Maintaining Integrity of Commission Proceedings

The Commission may exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings.

4. COMMISSION PERSONNEL

A. Members

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(2) Number of Members

Each Commission shall consist of at least three but no more than seven members, the number being determined by the Appointing Authority. For each such Commission, there shall also be one or two alternate members, the number being determined by the Appointing Authority.

(3) Qualifications

Each member and alternate member shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause.

(4) Presiding Officer

From among the members of each Commission, the Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.

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B. Prosecution

(1) Office of the Chief Prosecutor

(2) Prosecutors and Assistant Prosecutors

The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts

under the President's Military Order, and shall ensure proper management of personnel and resources.

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecution"). Prosecutors and Assistant Prosecutors shall be (a) Military Officers who are judge advocates of any United States armed force, or (b) special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States. The duties of the Prosecution are:

(a) To prepare charges for approval and referral by the Appointing Authority;
(b) To conduct the prosecution before the Commission of all cases referred for trial; and
(c) To represent the interests of the Prosecution in any review process.

C. Defense

(1) Office of the Chief Defense Counsel

The Chief Defense Counsel shall be a judge advocate of any United States armed force, shall supervise the overall defense efforts under the President's Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) Detailed Defense Counsel

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:

(a) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and
(b) To represent the interests of the Accused in any review process as provided by this Order.

(3) Choice of Counsel

(a) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A). After such selection of a new Detailed Defense Counsel, the original Detailed Defense Counsel will be relieved of all duties with respect to that case. If requested by the Accused, however, the Appointing Authority may allow the original Detailed Defense Counsel to continue to assist in representation of the Accused as another Detailed Defense Counsel.

(b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney: (i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be pre-qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by an Accused. Representation by Civilian Defense Counsel will

not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5).

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5. PROCEDURES ACCORDED THE ACCUSED

The following procedures shall apply with respect to the Accused:

A. The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.
B. The Accused shall be presumed innocent until proven guilty.
C. A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.
D. At least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with Section 6(H)(2).
E. The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.
F. The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.
G. If the Accused so elects, the Accused may testify at trial on the Accused's own behalf and shall then be subject to cross-examination.

H. The Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer. Such access shall be consistent with the requirements of Section 6(D)(5) and subject to Section 9. The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.

I. The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission.

J. The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.

K. The Accused may be present at every stage of the trial before the Commission, consistent with Section 6(B)(3), unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

L. Except by order of the Commission for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

M. The Accused may make a statement during sentencing proceedings.

N. The Accused may have Defense Counsel submit evidence to the Commission during sentencing proceedings.

O. The Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer), consistent with Section 6(B).

P. The Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final in accordance with Section 6(H)(2).

6. CONDUCT OF THE TRIAL

A. Pretrial Procedures

(1) Preparation of the Charges

The Prosecution shall prepare charges for approval by the Appointing Authority, as provided in Section 4(B)(2)(a).

(2) Referral to the Commission

The Appointing Authority may approve and refer for trial any charge against an individual or individuals within the jurisdiction of a Commission in accordance with Section 3(A) and alleging an offense within the jurisdiction of a Commission in accordance with Section 3(B).

(3) Notification of the Accused

The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel. The Prosecution also shall submit the charges approved by the Appointing Authority to the Presiding Officer of the Commission to which they were referred.

(4) Plea Agreements

The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration. Any agreement to plead guilty must include a written stipulation of fact, signed by the Accused, that confirms the guilt of the Accused and the voluntary and informed nature of the plea of guilty. If the Appointing Authority approves the plea agreement, the Commission will, after determining the voluntary and informed nature of the plea agreement, admit the plea agreement and stipulation into evidence and be bound to adjudge findings and a sentence pursuant to that plea agreement.

(5) Issuance and Service of Process; Obtaining Evidence

The Commission shall have power to:

(a) Summon witnesses to attend trial and testify;
(b) Administer oaths or affirmations to witnesses and other persons and to question witnesses;
(c) Require the production of documents and other evidentiary material; and
(d) Designate special commissioners to take evidence.

The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer's own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial in accordance with the President's Military Order and this Order. The Commission shall issue its process in the name of the Department of Defense over the signature of the Presiding Officer. Such process shall be served as directed by the Presiding Officer in a manner calculated to give reasonable notice to persons required to take action in accordance with that process.

B. Duties of the Commission During Trial

The Commission shall:

(1) Provide a full and fair trial.
(2) Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.
(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order. Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding

Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an *ex parte, in camera* presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to Section 9, Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable. Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

(4) Hold each session at such time and place as may be directed by the Appointing Authority. Members of the Commission may meet in closed conference at any time.

(5) As soon as practicable at the conclusion of a trial, transmit an authenticated copy of the record of trial to the Appointing Authority.

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D. Evidence

(1) Admissibility

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.

(2) Witnesses

(a) Production of Witnesses

The Prosecution or the Defense may request that the Commission hear the testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Commission may also summon and hear witnesses on its own initiative. The Commission may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness.

(b) Testimony

Testimony of witnesses shall be given under oath or affirmation. The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.

(c) Examination of Witnesses

A witness who testifies before the Commission is subject to both direct examination and cross-examination. The Presiding Officer shall maintain order in the proceedings and shall not permit badgering of witnesses or questions that are not material to the issues before the Commission. Members of the Commission may question witnesses at any time.

(d) Protection of Witnesses

The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in Section 6(D)(5)(a), in determining the appropriate methods of receiving testimony and evidence. The Presiding Officer may hear any presentation by the Prosecution or the Defense, including an *ex parte*, *in camera* presentation, regarding the safety of potential witnesses before determining the ways in which witnesses

and evidence will be protected. The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.

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F. Voting

Members of the Commission shall deliberate and vote in closed conference. A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense. An affirmative vote of two-thirds of the members is required for a finding of Guilty. When appropriate, the Commission may adjust a charged offense by exceptions and substitutions of language that do not substantially change the nature of the offense or increase its seriousness, or it may vote to convict of a lesser-included offense. An affirmative vote of two-thirds of the members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the members. Votes on findings and sentences shall be taken by secret, written ballot.

G. Sentence

Upon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper. Only a Commission of seven members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

H. Post-Trial Procedures

(1) Record of Trial

Each Commission shall make a verbatim transcript of its proceedings, apart from all Commission deliberations, and preserve all evidence admitted in the trial (including any sentencing proceedings) of each case brought before it, which shall constitute the record of trial. The court reporter shall prepare the official record of trial and submit it to the Presiding Officer for authentication upon completion. The Presiding Officer shall transmit the authenticated record of trial to the Appointing Authority. If the Secretary of Defense is serving as the Appointing Authority, the record shall be transmitted to the Review Panel constituted under Section 6(H)(4).

(2) Finality of Findings and Sentence

A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President's Military Order and in accordance with Section 6(H)(6) of this Order. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.

(3) Review by the Appointing Authority

If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4). If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.

(4) Review Panel

The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within thirty days after receipt of the record of trial, the Review Panel shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return 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.

(5) Review by the Secretary of Defense

The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.

(6) Final Decision

After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the

Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under Section 6(H)(5) shall constitute the final decision.

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9. PROTECTION OF STATE SECRETS

Nothing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.

10. OTHER

This Order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No provision in this Order shall be construed to be a requirement of the United States Constitution. Section and subsection captions in this document are for convenience only and shall not be used in construing the requirements of this Order. Failure to meet a time period specified in this Order, or supplementary regulations or instructions issued under Section 7(A), shall not create a right to relief for the Accused or any other person. Reference (f) shall not apply to this Order or any supplementary regulations or instructions issued under Section 7(A).

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b. Commentary on military commissions: fair trials and justice

In commentary on the military commissions as envisioned under the procedures in Military Commission Order No. 1, Legal Adviser of the U.S. State Department William H. Taft, IV, set forth the historical context of such commissions and concluded that the new procedures provided protections consistent with those set out in the 1949 Geneva Conventions, the customary principles found in article 75

(Fundamental Guarantees) of Additional Protocol I to the Geneva Conventions, and the International Covenant on Civil and Political Rights.

Mr. Taft's commentary, dated March 26, 2002, is set forth below in full and is available at *http://usinfo.state.gov/topical/pol/terror/02032603.htm.*

Since September 11, the world community has committed itself to bringing those responsible for the attacks on the World Trade Center and the Pentagon to justice. The United Nations Security Council has called upon all States to hold accountable those persons who aided, supported or harbored the perpetrators, organizers or sponsors of those terrible crimes. This is a multilateral battle for accountability and justice as well as a fight for the security of our people and our fundamental values. Like other nations, the United States has been taking steps to bring the 9/11 terrorists and their supporters to justice. Just last week, the Department of Defense issued rules and regulations that will govern the conduct of the military commissions that may be established to try persons accused of violations of the laws of war. Last November, President Bush set out the framework for such judicial bodies based upon their long history and basis under U.S. law. He noted that such commissions would provide the U.S. Government a potentially useful option to bring suspected terrorists to justice. The international community now knows how such tribunals would operate.

In preparing the procedures for the military commissions, the U.S. government has been well aware of various concerns that have been expressed regarding the treatment of persons who may be referred for trial as well as the need to assure that determinations of guilt or innocence are made promptly, after consideration of relevant evidence, and without jeopardizing the personal safety of witnesses, jurors, and others involved in the process.

Over the last fifty years, the U.S. military and Congress have worked strenuously to fashion through the Uniform Code of Military Justice a model judicial system designed to try American military personnel for their alleged crimes. The military justice system today produces just outcomes and provides defendants with

all the basic due process protections found in civilian criminal proceedings. It has earned a reputation among observers and practitioners as one of the fairest systems in the world. The Uniform Code itself expressly recognizes that military commissions have jurisdiction over violations of the laws and customs of war, and the United States has consistently used such commissions to try enemy combatants for such violations. As with the evolution of courts-martial procedures, the Pentagon's recently released Military Commission Order represents a significant advance in military commission procedures.

Military commissions have a well-established place in international law and practice. The Third Geneva Convention on the Protection of Prisoners of War, for example, presumes that POWs "shall be tried only by a military court," which has often been a military commission, and authorizes trials in civilian courts in certain instances. Nations as diverse as the Philippines, Australia, China, The Netherlands, France, Poland, Canada, Norway, and the United Kingdom have prosecuted war criminals in military commissions, to name just a few. The United States used military commissions as far back as 1780, during the American Revolutionary War, and again during and after the Mexican-American War, the American Civil War, and World War II. European States made similar use of military commissions in 19th-century conflicts and even more extensively in the 20th century. In fact, the Allies relied heavily upon military commissions to prosecute war criminals following World War II for the reason that their procedures are easily adapted to the special needs of such cases.

The military commission regulations just issued are consistent with this tradition and ensure that the conduct of U.S. military commissions will provide the fundamental protections found in international law. Indeed, in a number of respects the procedures represent improvements on past practice. In preparing the procedures, the Pentagon not only listened carefully but also took into account the constructive advice and concerns raised by other governments and the non-governmental community.

The procedures offer essential guarantees of independence and impartiality and afford the accused the protections and means of defense recognized by international law. They provide, in

particular, protections consistent with those set out in the 1949 Geneva Conventions, the customary principles found in Article 75 (Fundamental Guarantees) of Additional Protocol I to the Geneva Conventions, and the International Covenant on Civil and Political Rights. Even though many of these specific provisions may not be legally required under international law, the military commission procedures nevertheless comport with all of them.

For example, the Pentagon's procedures provide: a fair and public hearing, the presumption of innocence, the highest standard of proof beyond a reasonable doubt, the choice of both military and civilian counsel, adequate time and facilities to prepare for trial, the ability to be present at one's own trial (subject only to exceptional national security concerns, although defense counsel could be present), the ability to present a defense (including the right to examine and call witnesses), protection against self-incrimination, a requirement that guilty verdicts be unanimous in capital cases, and automatic review by a higher tribunal to which civilians may be appointed.

As noted, the procedures call for public hearings. By providing for closed proceedings when necessary, the regulations also assure that the accused may be brought to justice without risking the safety or security of victims and witnesses. In this respect, as in others, the regulations are similar to the rules of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, both of which provide that proceedings may be closed to the public on the basis of "public order or morality," the "safety, security or non-disclosure of the identity of a victim or witness," and "the protection of the interests of justice." In addition—and also consistent with the practice of other international criminal tribunals trying persons charged with war crimes—the regulations allow for the presentation of evidence in camera where its publication would endanger national security (e.g., classified information and intelligence sources). In all cases, however, such information will be made known to the accused's qualified defense counsel, who will have an opportunity to examine and challenge witnesses and the evidence.

Taken together, the recently published regulations will result in efficient and fair trials. Individual rights of those charged with

crimes will be respected, while assuring that those responsible for killing civilians and other acts of terrorism will be convicted.

4. Enemy Combatants Held by the United States

a. Status of enemy combatant detainees

(1) Determination by President Bush

On February 7, 2002, White House Press Secretary Ari Fleischer announced that President Bush had determined the legal status of the Taliban and al Qaeda detainees being held at Guantanamo Naval Base, Cuba. The United States would treat all Taliban and al Qaeda detainees in Guantanamo Bay humanely, consistent with applicable international principles. Although Afghanistan is a party to the 1949 Geneva Conventions, the President determined that the members of the Taliban who were detained did not meet the criteria set forth in article 4 of the Geneva Convention on Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 (1949), to qualify as prisoners of war. The President also concluded that al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Conventions. The press secretary's statement is set forth below.

The full text of the statement and responses to questions from the press is available at *www.state.gov/s/l/c8183.htm.*

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. . . Today President Bush affirms our enduring commitment to the important principles of the Geneva Convention. Consistent with American values and the principles of the Geneva Convention, the United States has treated and will continue to treat all Taliban and al Qaeda detainees in Guantanamo Bay humanely and consistent with the principles of the Geneva Convention.

They will continue to receive three appropriate meals a day, excellent medical care, clothing, shelter, showers, and the oppor-

tunity to worship. The International Community of the Red Cross can visit each detainee privately.

In addition, President Bush today has decided that the Geneva Convention will apply to the Taliban detainees, but not to the al Qaeda international terrorists.

Afghanistan is a party to the Geneva Convention. Although the United States does not recognize the Taliban as a legitimate Afghani government, the President determined that the Taliban members are covered under the treaty because Afghanistan is a party to the Convention.

Under Article 4 of the Geneva Convention, however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.

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. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.

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.

The war on terrorism is a war not envisaged when the Geneva Convention was signed in 1949. In this war, global terrorists transcend national boundaries and internationally target the innocent. The President has maintained the United States' commitment to the principles of the Geneva Convention, while recognizing that the Convention simply does not cover every situation in which people may be captured or detained by military forces, as we see in Afghanistan today.

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(2) Fact sheet on detainees

Also on February 7, the White House issued a fact sheet explaining further the policy of the United States toward the detainees and the specifics of its application.

The fact sheet is set forth below in full and is available at *www.whitehouse.gov/news/releases/2002/02/20020207-13.html*.

Status of Detainees at Guantanamo

United States Policy.

- The United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949.
- The President has determined that the Geneva Convention applies to the Taliban detainees, but not to the al-Qaida detainees.
- Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.
- Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs.
- Therefore, neither the Taliban nor al-Qaida detainees are entitled to POW status.
- Even though the detainees are not entitled to POW privileges, they will be provided many POW privileges as a matter of policy.

All detainees at Guantanamo are being provided:

- three meals a day that meet Muslim dietary laws
- water

- medical care
- clothing and shoes
- shelter
- showers
- soap and toilet articles
- foam sleeping pads and blankets
- towels and washcloths
- the opportunity to worship
- correspondence materials, and the means to send mail
- the ability to receive packages of food and clothing, subject to security screening

The detainees will not be subjected to physical or mental abuse or cruel treatment. The International Committee of the Red Cross has visited and will continue to be able to visit the detainees privately. The detainees will be permitted to raise concerns about their conditions and we will attempt to address those concerns consistent with security.

Housing. We are building facilities in Guantanamo more appropriate for housing the detainees on a long-term basis. The detainees now at Guantanamo are being housed in temporary open-air shelters until these more long-term facilities can be arranged. Their current shelters are reasonable in light of the serious security risk posed by these detainees and the mild climate of Cuba.

POW Privileges the Detainees will not receive. The detainees will receive much of the treatment normally afforded to POWs by the Third Geneva Convention. However, the detainees will not receive some of the specific privileges afforded to POWs, including:

- access to a canteen to purchase food, soap, and tobacco
- a monthly advance of pay
- the ability to have and consult personal financial accounts
- the ability to receive scientific equipment, musical instruments, or sports outfits

Many detainees at Guantanamo pose a severe security risk to those responsible for guarding them and to each other. Some of

these individuals demonstrated how dangerous they are in uprisings at Mazar-e-Sharif and in Pakistan. The United States must take into account the need for security in establishing the conditions for detention at Guantanamo.

Background on Geneva Conventions. The Third Geneva Convention of 1949 is an international treaty designed to protect prisoners of war from inhumane treatment at the hands of their captors in conflicts covered by the Convention. It is among four treaties concluded in the wake of WWII to reduce the human suffering caused by war. These four treaties provide protections for four different classes of people: the military wounded and sick in land conflicts; the military wounded, sick and shipwrecked in conflicts at sea; military persons and civilians accompanying the armed forces in the field who are captured and qualify as prisoners of war; and civilian non-combatants who are interned or otherwise found in the hands of a party (e.g. in a military occupation) during an armed conflict.

b. Habeas corpus litigation in the United States concerning enemy combatant detainees

During 2002 several suits were filed in the United States challenging various aspects of the detention of enemy combatants by the United States in the ongoing military hostilities following the terrorist attacks against the United States on September 11, 2001. The individuals included aliens captured in Afghanistan or elsewhere and detained at the U.S. military facility at Guantanamo Bay, Cuba, and U.S. citizens held as enemy combatants at U.S. military facilities in the United States.

At the end of 2002, litigation was still pending in these cases.

(1) Access to U.S. courts in habeas proceedings by detainees at Guantanamo

All efforts to file petitions of habeas corpus with U.S. courts by "next friends" on behalf of detainees in Guantanamo were

dismissed at the district court level, the courts finding, *inter alia*, no jurisdiction where detainees were held outside the sovereign territory of the United States. *Coalition of Clergy. v. Bush*, 189 F. Supp. 2d 1036 (C.D.Cal. 2002), *Rasul v. Bush,* 215 F. Supp. 2d 55 (D.D.C. 2002). In *Coalition of Clergy*, the dismissal was affirmed by the U.S. Court of Appeals for the Ninth Circuit on grounds that plaintiffs lacked standing; the analysis of the district court on jurisdiction over the habeas petition was vacated as not necessary to the decision. 310 F.3d 1153 (9th Cir. 2002).

The *Rasul* decision combined two cases: *Rasul v. Bush* concerned a petition for writ of habeas corpus and for additional relief filed by parents of three detainees at Guantanamo, British nationals Shafiq Rasul and Asif Iqbal, and Australian David Hicks. *Al Odah v. U.S.* was a suit brought by family members on behalf of twelve Kuwaiti detainees indirectly challenging detention by seeking access to counsel and families, the filing of charges, access to the courts or other tribunal and other relief. The district court concluded that in both cases a petition for habeas corpus was the exclusive avenue for relief and considered them as such. A third next-friend action was filed in the same district court, *Habib v. Bush*, 02-CV-1130 (D.D.C. 2002), seeking through writ of habeas corpus the release of another alien held at Guantanamo. Following its ruling in *Rasul v Bush*, the court issued an order on August 8, 2002, dismissing the Habib petition with prejudice for lack of jurisdiction.

Excerpts below from the decision in *Rasul* dismissing the petitions for habeas corpus provide the court's analysis of the lack of jurisdiction, consistent with positions taken by the U.S. briefs in the cases consolidated there. An appeal to the U.S. Court of Appeals for the D.C. Circuit was pending at the end of 2002.

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[V.]*B. The Ability of Courts to Entertain Petitions for Writs of Habeas Corpus Made By Aliens Held Outside the Sovereign Territory of the United States*

The Court . . . considers both cases as petitions for writs of habeas corpus on behalf of aliens detained by the United States at the military base at Guantanamo Bay, Cuba. In viewing both cases from this perspective, the Court concludes that the Supreme Court's ruling in *Johnson v. Eisentrager*, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950), and its progeny, are controlling and bars the Court's consideration of the merits of these two cases. . . .

1. *Johnson v. Eisentrager*

The *Eisentrager* case involved a petition for writs of habeas corpus filed by twenty-one German nationals in the United States District Court for the District of Columbia. The prisoners in *Eisentrager* had been captured in China for engaging in espionage against the United States following the surrender of Germany, but before the surrender of Japan, at the end of World War II. *Id.* at 766. Since the United States was at peace with Germany, the actions of the *Eisentrager* petitioners violated the laws of war. *Id.* Following a trial and conviction by a United States military commission sitting in China, with the express permission of the Chinese government, the prisoners were repatriated to Germany to serve their sentences at Landsberg Prison. *Id.* Their immediate custodian at Landsberg Prison was a United States Army officer under the Commanding General, Third United States Army, and the Commanding General, European Command. *Id.*

The district court dismissed the petition for want of jurisdiction. *Id.* at 767. An appellate panel reversed the decision of the district court and remanded the case for further proceedings. *See Eisentrager v. Forrestal*, 84 U.S. App. D.C. 396, 174 F.2d 961 (D.C. Cir. 1949). In an opinion by Judge E. Barrett Prettyman, the Court of Appeals for the District of Columbia Circuit held that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." 174 F.2d at 963.

A divided panel of the Supreme Court reversed the decision of the District of Columbia Circuit and affirmed the judgment of

the district court. *Eisentrager*, 339 U.S. at 791. In finding that *no* court had jurisdiction to entertain the claims of the German nationals, the Supreme Court, in an opinion by Justice Robert Jackson, found that a court was unable to extend the writ of habeas corpus to aliens held outside the sovereign territory of the United States. *Id.* at 778.

* * * *

Accordingly, the Court finds that *Eisentrager* is applicable to the aliens in these cases, who are held at Guantanamo Bay, even in the absence of a determination by a military commission that they are "enemies."[13] While it is true that the petitioners in *Eisentrager* had already been convicted by a military commission, *id.* at 766, the *Eisentrager* Court did not base its decision on that distinction. Rather, *Eisentrager* broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus.

. . . Given that *Eisentrager* applies to the aliens presently detained at the military base at Guantanamo Bay, the only question remaining for the Court's resolution is whether Guantanamo Bay, Cuba is part of the sovereign territory of the United States.

4. Is Guantanamo Bay Part of the Sovereign Territory of the United States?

The Court in *Eisentrager* discusses the territory of the United States in terms of sovereignty. *Id.* at 778 ("for these prisoners at no relevant time were within any territory over which the United States is sovereign"). It is undisputed, even by the parties, that Guantanamo Bay is not part of the sovereign territory of the

[13] The United States confronts an untraditional war that presents unique challenges in identifying a nebulous enemy. In earlier times when the United States was at war, discerning "the enemy" was far easier than today. "In war 'every individual of the one nation must acknowledge every individual of the other nation as his own enemy.' " *Eisentrager* 339 U.S. at 772 (quoting *The Rapid*, 8 Cranch 155, 161 (1814)). The two cases at bar contain nationals from three friendly countries at peace with the United States, demonstrating the difficulty in determining who is the "enemy."

United States.[14] Thus, the only question remaining for resolution is whether this fact alone is an absolute bar to these suits, or whether aliens on a United States military base situated in a foreign country are considered to be within the territorial jurisdiction of the United States, under a *de facto* theory of sovereignty.

Petitioners and Plaintiffs assert that the United States has *de facto* sovereignty over the military base at Guantanamo Bay, and that this provides the Court with the basis needed to assert jurisdiction. In other words, Petitioners and Plaintiffs argue that even if the United States does not have *de jure* sovereignty over the military facility at Guantanamo Bay, it maintains *de facto* sovereignty due to the unique nature of the control and jurisdiction the United States exercises over this military base. According to Petitioners and Plaintiffs, if the United States has *de facto* sovereignty over the military facility at Guantanamo Bay, then *Eisentrager* is inapplicable to their cases and the Court is able to assume jurisdiction over their claims. However, the cases relied on by Petitioners and Plaintiffs to support their thesis are belied not only by *Eisentrager*, which never qualified its definition of sovereignty in such a manner, but also by the very case law relied on by Petitioners and Plaintiffs.

At oral argument, when asked for a case that supported the view that *de facto* sovereignty would suffice to provide the Court

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[14] The United States occupies Guantanamo Bay under a lease entered into with the Cuban government in 1903. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16–23, 1903, U.S.-Cuba, art. III, T.S. 418. The lease provides:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [the military base at Guantanamo Bay], on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire . . . for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

Id. As is clear from this agreement, the United States does not have sovereignty over the military base at Guantanamo Bay.

with jurisdiction, both Petitioners and Plaintiffs directed the Court to *Ralpho v. Bell*, 186 U.S. App. D.C. 368, 569 F.2d 607 (D.C. Cir. 1977). Tr. at 33, 62–63. The *Ralpho* case involves a claim brought under the Micronesian Claims Act of 1971, which was enacted by the United States Congress to establish a fund to compensate Micronesians for losses incurred during the hostilities of World War II. *Ralpho*, 569 F.2d at 611. . . .

. . . . *Ralpho* does not stand for the proposition that a court can grant constitutional rights over a geographical area where de facto sovereignty is present. Rather, *Ralpho* stands for a limited extension of the uncontested proposition that aliens residing in the sovereign territories of the United States are entitled to certain basic constitutional rights.

* * * *

. . . [T]he Court in *Ralpho* analogized the situation before it to those cases granting constitutional rights to the peoples of United States territories, even though the trust agreement with the United Nations did not provide for sovereignty over Micronesia. *Ralpho*, 569 F.2d at 619 n. 71. The cases involving the territories of the United States, relied on by the *Ralpho* Court, are fundamentally different from the two cases presently before the Court. The military base at Guantanamo Bay, Cuba, is nothing remotely akin to a territory of the United States, where the United States provides certain rights to the inhabitants. Rather, the United States merely leases an area of land for use as a naval base. Accordingly, the Court is hard-pressed to adopt Petitioners' and Plaintiffs' view that the holding in *Ralpho* favors their claims. In fact, another district court considering whether a *de facto* sovereignty test should be used to analyze claims occurring at the military base at Guantanamo Bay flatly rejected the idea. *Bird v. United States*, 923 F. Supp. 338 (D. Conn. 1996). . . .

The *Bird* case is not the only court to reject a *de facto* sovereignty test for claims involving aliens located at the military base at Guantanamo Bay. *Cuban American Bar Ass'n, Inc. v. Christopher*, 443 F.3d 1412 (11th Cir. 1995), *cert. denied*, 515 U.S. 1142 (1995). . . .

VI. CONCLUSION

The Court concludes that the military base at Guantanamo Bay, Cuba is outside the sovereign territory of the United States. Given that under *Eisentrager*, writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States, this Court does not have jurisdiction to entertain the claims made by Petitioners in *Rasul* or Plaintiffs in *Odah*. Of course, just as the *Eisentrager* Court did not hold "that these prisoners have no right which the military authorities are bound to respect," *Eisentrager*, 339 U.S. at 789 n.14, this opinion, too, should not be read as stating that these aliens do not have some form of rights under international law. Rather, the Court's decision solely involves whether it has jurisdiction to consider the constitutional claims that are presented to the Court for resolution.

(2) Constitutional rights of U.S. citizens being detained in the United States

In two separate cases, habeas actions were filed on behalf of U.S. citizens being detained as enemy combatants in the United States. *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir. 2002), 296 F.3d 278 (4th Cir. 2002), 243 F. Supp. 2d 527 (E.D. Va. 2002) and *Padilla v. Bush*, 233 F. Supp 2d. 564 (S.D.N.Y. 2002). Both cases were still pending at the end of 2002.

(i) Hamdi v. Rumsfeld

Yaser Esam Hamdi was captured by allied forces in Afghanistan after he surrendered with a Taliban unit while armed with an AK-47 assault rifle and was held in Norfolk, Virginia. Hamdi is apparently a Saudi national, born in Louisiana. Hamdi's father, Esam Fouad Hamdi, filed the habeas action at issue in the case on behalf of his son in June 2002. It alleged that Hamdi, as an American citizen, "enjoys the full protections of the Constitution," and that Hamdi's detention without charges or counsel violated the Fifth and Fourteenth Amendments to the U.S. Constitution.

On June 11, 2002, the U.S. District Court for the Eastern District of Virginia appointed a federal public defender in the case with an order that the public defender be allowed to meet with Hamdi in private. The U.S. Court of Appeals for the Fourth Circuit stayed the district court proceedings and, on July 12, reversed the June 11 order, remanding for further proceedings. 296 F.3d 278 (4th Cir. 2002). On July 25, 2002, the United States filed a combined return and motion to dismiss. That submission included a sworn declaration of the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs. The Mobbs Declaration explained the circumstances surrounding Hamdi's capture and the military's determination to detain him as an enemy combatant. On August 16, 2002, the court found the government's responses insufficient to justify Hamdi's detention and ordered production of additional materials.

The United States appealed the August 16 order. In a decision of January 8, 2003, the Fourth Circuit reversed the district court and remanded with directions to dismiss the habeas corpus petition. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003). Excerpts from the court of appeals decision are set forth below.

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* * * *

II. Yaser Esam Hamdi is apparently an American citizen. He was also captured by allied forces in Afghanistan, a zone of active military operations. This dual status—that of American citizen and that of alleged enemy combatant—raises important questions about the role of the courts in times of war.

A. The importance of limitations on judicial activities during wartime may be inferred from the allocation of powers under our constitutional scheme "Congress and the President, like the courts, possess no power not derived from the Constitution." Ex parte Quirin, 317 U.S. 1, 25, 87 L. Ed. 3, 63 S. Ct. 2 (1942). Article I, section 8 grants Congress the power to "provide for the common Defence and general Welfare of the United States . . . To declare

War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support armies . . . [and] To provide and maintain a navy." Article II, section 2 declares that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."

The war powers thus invest "the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war." Quirin, 317 U.S. at 26. These powers include the authority to detain those captured in armed struggle. Hamdi II, 296 F.3d at 281–82.[3] These powers likewise extend to the executive's decision to deport or detain alien enemies during the duration of hostilities, see Ludecke v. Watkins, 335 U.S. 160, 173, 92 L. Ed. 1881, 68 S. Ct. 1429 (1948), and to confiscate or destroy enemy property, see Juragua Iron Co. v. United States, 212 U.S. 297, 306, 53 L. Ed. 520, 29 S. Ct. 385, 44 Ct. Cl. 595 (1909).

Article III contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II. "In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." Hamdi II, 296 F.3d at 281.

The reasons for this deference are not difficult to discern. Through their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution's allocation of the warmaking powers reflects not only the expertise and experience lodged within the executive,

[3] Persons captured during wartime are often referred to as "enemy combatants." While the designation of Hamdi as an "enemy combatant" has aroused controversy, the term is one that has been used by the Supreme Court many times. See, e.g., Madsen v. Kinsella, 343 U.S. 341, 355, 96 L. Ed. 988, 72 S. Ct. 699 (1952); In re Yamashita, 327 U.S. 1, 7, 90 L. Ed. 499, 66 S. Ct. 340 (1946); Quirin, 317 U.S. at 31.

but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them. Thus the Supreme Court has lauded "the operation of a healthy deference to legislative and executive judgments in the area of military affairs." Rostker v. Goldberg, 453 U.S. 57, 66, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981).

The deference that flows from the explicit enumeration of powers protects liberty as much as the explicit enumeration of rights. The Supreme Court has underscored this founding principle: "The ultimate purpose of this separation of powers is to protect the liberty and security of the governed." Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272, 115 L. Ed. 2d 236, 111 S. Ct. 2298 (1991). Thus, the textual allocation of responsibilities and the textual enumeration of rights are not dichotomous, because the textual separation of powers promotes a more profound understanding of our rights. For the judicial branch to trespass upon the exercise of the war-making powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical. This right of the people is no less a right because it is possessed collectively.

These interests do not carry less weight because the conflict in which Hamdi was captured is waged less against nation-states than against scattered and unpatriated forces. We have emphasized that the "unconventional aspects of the present struggle do not make its stakes any less grave." Hamdi II, 296 F.3d at 283. Nor does the nature of the present conflict render respect for the judgments of the political branches [**18] any less appropriate. We have noted that the "political branches are best positioned to comprehend this global war in its full context," id., and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches.

B. Despite the clear allocation of war powers to the political branches, judicial deference to executive decisions made in the name of war is not unlimited. . . .

Drawing on the Bill of Rights' historic guarantees, the judiciary plays its distinctive role in our constitutional structure when it reviews the detention of American citizens by their own government. Indeed, if due process means anything, it means that the courts must defend the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." The Constitution is suffused with concern about how the state will wield its awesome power of forcible restraint. . . .

. . . The detention of United States citizens must be subject to judicial review.

* * * *

The safeguards that all Americans have to expect in criminal prosecutions do not translate neatly to the arena of armed conflict. In fact, if deference to the executive is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain. For there is a "well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, [and] enemy belligerents, prisoners of war, [and] others charged with violating the laws of war." Duncan v. Kahanamoku, 327 U.S. 304, 313–314 (1946). As we emphasized in our prior decision, any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect this deference as well as "a recognition that government has no more profound responsibility" than the protection of American citizens from further terrorist attacks. Hamdi II, 296 F.3d at 283.

In this regard, it is relevant that the detention of enemy combatants serves at least two vital purposes. First, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies. . . .

Second, detention in lieu of prosecution may relieve the burden on military commanders of litigating the circumstances of a capture halfway around the globe. This burden would not be inconsiderable and would run the risk of "saddling military decision-making with the panoply of encumbrances associated with civil litigation" during a period of armed conflict. As the Supreme Court has recognized, "it would be difficult to devise more effective fettering

of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." [citing Johnson v. Eisentrager, 339 U.S. 763 (1950).] (fn. omitted).

* * * *

The designation of Hamdi as an enemy combatant thus bears the closest imaginable connection to the President's constitutional responsibilities during the actual conduct of hostilities. We therefore approach this case with sensitivity to both the fundamental liberty interest asserted by Hamdi and the extraordinary breadth of warmaking authority conferred by the Constitution and invoked by Congres and the executive branch.

* * * *

Hamdi and amici have in fact pressed two purely legal grounds for relief: 18 U.S.C. § 4001(a) and Article 5 of the Geneva Convention. We now address them both. (fn. omitted)

A. 18 U.S.C. § 4001 regulates the detentions of United States citizens. . . . It states . . . :

> (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress. . . .

Hamdi argues that there is no congressional sanction for his incarceration and that § 4001(a) therefore prohibits his continued detention. We find this contention unpersuasive.

Even if Hamdi were right that § 4001(a) requires Congressional authorization of his detention, Congress has, in the wake of the September 11 terrorist attacks, authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (Sept. 18, 2001) (emphasis added). As noted above, capturing and detaining enemy combatants

is an inherent part of warfare; the "necessary and appropriate force" referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops. Furthermore, Congress has specifically authorized the expenditure of funds for "the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined . . . to be similar to prisoners of war." 10 U.S.C. § 956 (5) (2002). It is difficult if not impossible to understand how Congress could make appropriations for the detention of persons "similar to prisoners of war" without also authorizing their detention in the first instance.

Any alternative construction of these enactments would be fraught with difficulty. As noted above, the detention of enemy combatants serves critical functions. Moreover, it has been clear since at least 1942 that "citizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." Quirin, 317 U.S. at 37. If Congress had intended to override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit.

* * * *

Hamdi and amici also contend that Article 5 of the Geneva Convention applies to Hamdi's case and requires an initial formal determination of his status as an enemy belligerent "by a competent tribunal." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.

This argument falters also because the Geneva Convention is not self-executing. "Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action." Goldstar (Panama) v. United States, 967 F.2d 965, 968 (4th Cir. 1992). The Geneva Convention evinces no such intent. Certainly there is no explicit provision for enforcement by any form of private petition. And what discussion there is of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations. If two warring parties disagree about what the Convention requires

of them, Article 11 instructs them to arrange a "meeting of their representatives" with the aid of diplomats from other countries, "with a view to settling the disagreement." Geneva Convention, at art. 11. Similarly, Article 132 states that "any alleged violation of the Convention" is to be resolved by a joint transnational effort "in a manner to be decided between the interested Parties." Id. at art. 132; cf. id. at arts. 129–30 (instructing signatories to enact legislation providing for criminal sanction of "persons committing . . . grave breaches of the present Convention"). We therefore agree with other courts of appeals that the language in the Geneva Convention is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries."

* * * *

Even if Article 5 were somehow self-executing, there are questions about how it would apply to Hamdi's case. In particular, it is anything but clear that the "competent tribunal" which would determine Hamdi's status would be an Article III court. Every country has different tribunals, and there is no indication that the Geneva Convention was intended to impose a single adjudicatory paradigm upon its signatories. Moreover, Hamdi's argument begs the question of what kind of status determination is necessary under Article 5 and how extensive it should be. Hamdi and the amici make much of the distinction between lawful and unlawful combatants, noting correctly that lawful combatants are not subject to punishment for their participation in a conflict. But for the purposes of this case, it is a distinction without a difference, since the option to detain until the cessation of hostilities belongs to the executive in either case. It is true that unlawful combatants are entitled to a proceeding before a military tribunal before they may be punished for the acts which render their belligerency unlawful. But they are also subject to mere detention in precisely the same way that lawful prisoners of war are. The fact that Hamdi might be an unlawful combatant in no way means that the executive is required to inflict every consequence of that status on him.

The Geneva Convention certainly does not require such treatment.

For all these reasons, we hold that there is no purely legal barrier to Hamdi's detention. We now turn our attention to the question of whether the August 16 order was proper on its own terms.

* * * *

A review of the court's August 16 order reveals the risk of "standing the warmaking powers of Articles I and II on their heads." The district court, for example, ordered the government to produce all Hamdi's statements and notes from interviews. Yet it is precisely such statements, relating to a detainee's activities in Afghanistan, that may contain the most sensitive and the most valuable information for our forces in the field. The risk created by this order is that judicial involvement would proceed, increment by increment, into an area where the political branches have been assigned by law a preeminent role.

* * * *

Viewed in their totality, the implications of the district court's August 16 production order could not be more serious. The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi's detention may have been slain or injured in battle. Others might have to be diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance.

For the foregoing reasons, the court's August 16 production request cannot stand.

V. The question remains, however, whether Hamdi's petition must be remanded for further proceedings or dismissed

* * * *

The Mobbs affidavit consists of two pages and nine paragraphs in which Mobbs states that he was "substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them." In the affidavit, Mobbs avers that Hamdi entered Afghanistan in July or August of 2001 and affiliated with a Taliban military unit. Hamdi received weapons training from the Taliban and remained with his military unit until his surrender to Northern Alliance forces in late 2001. At the time of his capture, Hamdi was in possession of an AK-47 rifle. After his capture, Hamdi was transferred first from Konduz, Afghanistan to the prison in Mazar-e-Sharif, and then to a prison in Sheberghan, Afghanistan where he was questioned by a United States interrogation team. This interrogation team determined that Hamdi met "the criteria for enemy combatants over whom the United States was taking control." Hamdi was then transported to the U.S. short term detention facility in Kandahar, and then transferred again to Guantanamo Bay and eventually to the Norfolk Naval Brig. According to Mobbs, a subsequent interview with Hamdi confirmed the details of his capture and his status as an enemy combatant.

The district court approached the Mobbs declaration by examining it line by line, faulting it for not providing information about whether Hamdi had ever fired a weapon, the formal title of the Taliban military unit Hamdi was with when he surrendered, the exact composition of the U.S. interrogation team that interviewed Hamdi in Sheberghan, and even the distinguishing characteristics between a Northern Alliance miliary unit and a Taliban military unit. Concluding that the factual allegations were insufficient to support the government's assertion of the power to detain Hamdi under the war power, the court then ordered the production of the numerous additional materials outlined previously. We think this inquiry went far beyond the acceptable scope of review.

. . . The court's approach . . . had a signal flaw. We are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers.

We are dealing with the executive's assertion of its powers to detain under the war powers of Article II. . . .

. . . [W]e will not require the government to fill what the district court regarded as gaps in the Mobbs affidavit. The factual averments in the affidavit, if accurate, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by Article II, Section 2 of the Constitution and, as discussed elsewhere, that it is consistent with the Constitution and laws of Congress. . . .

* * * *

Hamdi contends that, although international law and the laws of this country might generally allow for the detention of an individual captured on the battlefield, these laws must vary in his case because he is an American citizen now detained on American soil. As an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime. But as we have previously pointed out, Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to the well-established laws and customs of war. Hamdi's citizenship rightfully entitles him to file this petition to challenge his detention, but the fact that he is a citizen does not affect the legality of his detention as an enemy combatant.

Indeed, this same issue arose in Quirin . . . The Court . . . did not need to determine [the] citizenship [of one petitioner claiming U.S. citizenship] because it held that the due process guarantees of the Fifth and Sixth Amendments were inapplicable in any event. It noted that "citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful." The petitioner who alleged American citizenship was treated identically to the other German saboteurs.

The Quirin principle applies here. One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such. The privilege of citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine

its legality under the war powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there.

* * * *

To conclude, we hold that, despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration. Where, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in an zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention. Because these circumstances are present here, Hamdi is not entitled to habeas relief on this basis.

Finally, we address Hamdi's contention that even if his detention was at one time lawful, it is no longer so because the relevant hostilities have reached an end. In his brief, Hamdi alleges that the government "confuses the international armed conflict that allegedly authorized Hamdi's detention in the first place with an on-going fight against individuals whom Respondents refuse to recognize as 'belligerents' under international law." Whether the timing of a cessation of hostilities is justiciable is far from clear. The executive branch is also in the best position to appraise the status of a conflict, and the cessation of hostilities would seem no less a matter of political competence than the initiation of them. In any case, we need not reach this issue here. The government notes that American troops are still on the ground in Afghanistan, dismantling the terrorist infrastructure in the very country where Hamdi was captured and engaging in reconstruction efforts which may prove dangerous in their own right. Because under the most circumscribed definition of conflict hostilities have not yet reached their end, this argument is without merit.

* * * *

(ii) Padilla v. Bush

The other habeas case concerning an unlawful enemy combatant with U.S. citizenship involved Jose Padilla. Padilla was originally arrested on May 8, 2002, in Chicago, Illinois, on a material witness warrant, pursuant to 18 U.S.C. § 3144. On June 9, 2002, President Bush determined that Padilla was an enemy combatant, as set forth below in full. President Bush's determination was attached to the U.S. Response to, and Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus, submitted to the U.S. District Court for the Southern District of New York on August 27, 2002.

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* * * *

Based on the information available to me from all sources, [REDACTED]

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107–40);

I, GEORGE W BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;
(2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;
(3) Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;
(4) Mr. Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda. that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda

on the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) It is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and

(7) it is [REDACTED] consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.

Padilla was transferred to the custody of the U.S. Department of Defense at the Consolidated Naval Brig in Charleston, South Carolina. In seeking habeas corpus relief, Padilla's representative argued that the fact that he was arrested in the United States rather than on the battlefield in Afghanistan distinguished his case. His representative also objected to the court giving consideration to a classified version of a declaration by Department of Defense official Michael H. Mobbs, which had been filed *ex parte* under seal to provide additional factual detail concerning the President's determination. The declaration in the public record submitted by Mr. Mobbs to support the U.S. motion to dismiss stated that Padilla came to the United States to advance plans to detonate explosive devices, including a "radiological dispersal device (or 'dirty bomb')."

On December 4, 2002, the district court denied the U.S. motion to dismiss the case for lack of standing and jurisdiction. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). The court decided that Padilla's counsel had standing to proceed with the habeas proceeding and that the court had jurisdiction over Secretary of Defense Donald Rumsfeld, whom it found to be the appropriate defendant in

the case. It also concluded that Padilla could "consult with counsel in aid of pursuing this petition, under conditions that will minimize the likelihood that he can use his lawyers as unwilling intermediaries for the transmission of information to others and may, if he chooses, submit facts and argument to the court in aid of his petition." The court did not rely on the classified version of the Mobbs declaration filed under seal, concluding:

> to resolve the issue of whether Padilla was lawfully detained on the facts present here, the court will examine only whether the President had some evidence to support his finding that Padilla was an enemy combatant, and whether that evidence has been mooted by events subsequent to his detention; the court will not at this time use the document submitted in camera to determine whether the government has met that standard.

As to what it characterized as "the central issue presented in this case," however, the court concluded that "the President is authorized under the Constitution and by law to direct the military to detain enemy combatants in the circumstances present here, such that Padilla's detention is not *per se* unlawful." The court made clear that this central issue was "whether the President has the authority to designate as an unlawful combatant an American citizen, captured on American soil, and to detain him without trial." Based on its analysis of *Ex parte Quirin*, 317 U.S. 1 (1942), the court concluded:

> Here, the basis for the President's authority to order the detention of an unlawful combatant arises both from the terms of the Joint Resolution, and from his constitutional authority as commander in chief as set forth in The Prize Cases and other authority discussed above. Also . . . no principle in the Third Geneva Convention impedes the exercise of that authority. . . .

The district court also dismissed Padilla's claims that 18 U.S.C. § 4001(a) barred his confinement.

c. Other litigation involving enemy combatant status

In the context of criminal prosecution under various anti-terrorism laws before the U.S. District Court for the Eastern District of Virginia, John Walker Lindh sought dismissal of one count of the indictment against him on the ground that he was a Taliban soldier and, as a lawful combatant, was entitled to immunity from prosecution under the customary international law of war and the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 ("GPW"). The U.S. Government countered that the claim was foreclosed as a matter of law because the President had already conclusively determined that the Taliban were unlawful combatants, and combatant immunity was only available to lawful combatants. The district court did not accept the U.S. argument that the President's determination on the matter was a nonjusticiable political question. The court held, however, that it had jurisdiction to interpret the treaty at issue, which insofar as it was pertinent to the case was self-executing, and that executive branch interpretations are entitled "to some degree of deference." The appropriate deference, according to the court, was "to accord substantial or great weight to the President's decision regarding the interpretation and application of the GPW to Lindh, provided the interpretation and application of the treaty to Lindh may be said to be reasonable and not contradicted by the terms of the treaty or the facts. It is this proviso that is the focus of the judicial review here of the President's determination that Lindh is an unlawful combatant under the GPW." *U.S. v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) Excerpts from the decision of July 11, 2002, on lawful-combatant immunity and the non-applicability of the GPW in this case are set forth below.

John Walker Lindh entered into a plea agreement with the United States and was sentenced to 20 years imprisonment.

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* * * *

Lindh claims that Count One of the Indictment should be dismissed because, as a Taliban soldier, he was a lawful combatant entitled to the affirmative defense of lawful combatant immunity.[16]

Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.[17] Belligerent acts committed in armed conflict by enemy members of the armed forces may be punished as crimes under a belligerent's municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict.[18] This doctrine has a long history, which is reflected in part in various early international conventions, statutes and documents.[19] But more pertinent, indeed

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[16] Lindh makes no claim of lawful combatant immunity with respect to the Indictment's allegations that he was a member or soldier of al Qaeda. Instead, Lindh focuses his lawful combatant immunity argument solely on the Indictment's allegations that he was a Taliban member. This focus is understandable as there is no plausible claim of lawful combatant immunity in connection with al Qaeda membership. Thus, it appears that Lindh's goal is to win lawful combatant immunity with respect to the Taliban allegations and then to dispute factually the Indictment's allegations that he was a member of al Qaeda.

Also worth noting is that the government has not argued here that the Taliban's role in providing a home, a headquarters, and support to al Qaeda and its international terrorist activities serve to transform the Taliban from a legitimate state government into a terrorist institution whose soldiers are not entitled to lawful combatant immunity status. Put another way, the government has not argued that al Qaeda controlled the Taliban for its own purposes and that so-called Taliban soldiers were accordingly merely agents of al Qaeda, not lawful combatants.

[17] *See, e.g.,* Waldemar A. Solf & Edward R. Cummings, A *Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949,* 9 Case W. Res. J. Int'l L. 205, 212 (1977).

[18] *See* James W. Garner, *Punishment of Offenders Against the Laws and Customs of War,* 14 Am. J. Int'l L. 70, 73 (1920); Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion 712 (1961).*

[19] For example, Article 57 of the Lieber Code of 1863, which governed the conduct of war for the Union Army during the American Civil War and which served as the basis for the modern law of war treaties, provided that "so soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike

controlling, here is that the doctrine also finds expression in the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), to which the United States is a signatory. Significantly, Article 87 of the GPW admonishes that combatants "may not be sentenced . . . to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." GPW, art. 87. Similarly, Article 99 provides that "no prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed." GPW, art. 99. These Articles, when read together, make clear that a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war.

The inclusion of the lawful combatant immunity doctrine as a part of the GPW is particularly important here given that the GPW, insofar as it is pertinent here, is a self-executing treaty[20] to which the United States is a signatory. It follows from this that the GPW provisions in issue here are a part of American law and thus binding in federal courts under the Supremacy Clause.[21] This point,

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acts are not individual crimes or offenses." Instructions for the Government of the Armies of the United States in the Field, Headquarters, United States Army, Gen. Order No. 100 (Apr. 24, 1863), reprinted in The Laws of Armed Conflicts *3 (3d ed. 1988)*. See also *Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; Brussels Declaration of 1874, Article IX, July 27, 1874,* reprinted in The Laws of Armed Conflicts *25 (3d ed. 1988);* Manual of Military Law *240 (British War Office 1914)*.

[20] Treaties are typically classified as self-executing or executory. Executory treaties are addressed to the Congress and require congressional action before becoming effective in domestic courts, whereas a self-executing treaty "is one that operates of itself without the aid of legislation." 74 Am. Jur. 2d *Treaties* § 3. The portions of the GPW relevant here neither invite nor require congressional action and hence fall properly into the self-executing category. *See* C. Vasquez, *The Four Doctrines of Self-Executing Treaties,* 89 Am. J. Int'l L. 695 (1995).

[21] *See* U.S. Const. art. VI, § 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. . . .").

which finds support in the cases,[22] is essentially conceded by the government.[23] Moreover, the government does not dispute that this immunity may, under appropriate circumstances, serve as a defense to criminal prosecution of a lawful combatant.

Importantly, this lawful combatant immunity is not automatically available to anyone who takes up arms in a conflict. Rather, it is generally accepted that this immunity can be invoked only by members of regular or irregular armed forces who fight on behalf of a state and comply with the requirements for lawful combatants.[24] Thus, it is well-established that

> the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces.

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[22] *See United States v. Noriega,* 808 F. Supp. 791, 799 (S.D. Fla. 1990) ("It is inconsistent with both the language and spirit of the [GPW] and with our professed support of its purpose to find that the rights established therein cannot be enforced by individual POWs in a court of law.").

[23] Also worth noting is that even prior to the ratification of the GPW, some American courts recognized the lawful combatant immunity doctrine. *See Ex Parte Quirin,* 317 U.S. 1, 30–31, 87 L. Ed. 3, 63 S. Ct. 2 (1942); *see also Johnson v. Eisentrager,* 339 U.S. 763, 793, 94 L. Ed. 1255, 70 S. Ct. 936 (1950) (Black, J., dissenting) ("Legitimate 'acts of warfare,' however murderous, do not justify criminal conviction. . . . It is no 'crime' to be a soldier. . . .") (citing *Ex Parte Quirin,* 317 U.S. at 30–31); *United States v. Valentine,* 288 F. Supp. 957, 987 (D.P.R. 1968) ("Mere membership in the armed forces could not under any circumstances create criminal liability. . . . Our domestic law on conspiracy does not extend that far.") (citing *Ford v. Surget,* 97 U.S. 594, 605–06, 24 L. Ed. 1018 (1878)).

[24] *See, e.g.,* Howard S. Levie, *Prisoners of War in International Armed Conflict,* 59 Naval War College Int'l L. Stud. 53 n.192 (1977). Neither presented nor decided here is the question whether lawful combatant immunity is available to one who takes up arms in combat against his own country, as the Indictment alleges Lindh did in this case. At least one commentator suggests that principles of international law permit a nation to prosecute any of its citizens who take up arms against it for treason, even if the citizen does so as part of a lawful armed force. *See* Allan Rosas, *The Legal Status of Prisoners of War* 383 (1976).

> Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

Ex Parte Quirin, 317 U.S. 1, 30–31, 87 L. Ed. 3, 63 S. Ct. 2 (1942) (footnote omitted). The GPW also reflects this distinction between lawful and unlawful combatants, with only the former eligible for immunity from prosecution. *See* GPW, art. 87, 99. Thus, the question presented here is whether Lindh is a lawful combatant entitled to immunity under the GPW.

* * * *

The GPW sets forth four criteria an organization must meet for its members to qualify for lawful combatant status:

i. the organization must be commanded by a person responsible for his subordinates;
ii. the organization's members must have a fixed distinctive emblem or uniform recognizable at a distance;
iii. the organization's members must carry arms openly; and
iv. the organization's members must conduct their operations in accordance with the laws and customs of war.

See GPW, art. 4(A)(2). Nor are these four criteria unique to the GPW; they are also established under customary international lawn[34] and were also included in the Hague Regulations of 1907. *See* Hague Convention Respecting the Laws and Customs of War

[34] These criteria were first codified in large part in the Brussels Declaration of 1874, Article IX, July 27, 1874, *reprinted in The Laws of Armed Conflicts* 25 (3d ed. 1988). These standards have long been applied by liberal democracies. As explained in the British Manual of Military Law contemporaneous with the Hague Regulations, "it is taken for granted that all members of the army as a matter of course will comply with the four conditions [required for lawful combatant status]; should they, however, fail in this respect . . . they are liable to lose their special privileges of armed forces." *Manual of Military Law* 240 (British War Office 1914).

on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (Hague Regulations).[35]

In the application of these criteria to the case at bar, it is Lindh who bears the burden of establishing the affirmative defense that he is entitled to lawful combatant immunity,[36] *i.e.,* that the Taliban satisfies the four criteria required for lawful combatant status outlined by the GPW. On this point, Lindh has not carried his burden; indeed, he has made no persuasive showing at all on this point. For this reason alone, it follows that the President's decision denying Lindh lawful combatant immunity is correct. In any event, a review of the available record information leads to the same conclusion. Thus, it appears that the Taliban lacked the command structure necessary to fulfill the first criterion, as it is manifest that the Taliban had no internal system of military command or discipline. As one observer noted, "there is no clear military structure with a hierarchy of officers and commanders while unit commanders are constantly being shifted around," and

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[35] Lindh asserts that the Taliban is a "regular armed force," under the GPW, and because he is a member, he need not meet the four conditions of the Hague Regulations because only Article 4(A)(2), which addresses irregular armed forces, explicitly mentions the four criteria. This argument is unpersuasive; it ignores long-established practice under the GPW and, if accepted, leads to an absurd result. First, the four criteria have long been understood under customary international law to be the defining characteristics of any lawful armed force. *See supra* n.33. Thus, all armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity. Were this not so, the anomalous result that would follow is that members of an armed force that met none of the criteria could still claim lawful combatant immunity merely on the basis that the organization calls itself a "regular armed force." It would indeed be absurd for members of a so-called "regular armed force" to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war. Simply put, the label "regular armed force" cannot be used to mask unlawful combatant status.

[36] Defendants bear the burden with respect to affirmative defenses, *i.e.,* defenses that do not merely negate one of the elements of a crime. *See Mullaney v. Wilbur,* 421 U.S. 684, 697–99, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975); *Smart v. Leeke,* 873 F.2d 1558, 1565 (4th Cir. 1989).

the Taliban's "haphazard style of enlistment . . . does not allow for a regular or disciplined army." Kamal Matinuddin, *The Taliban Phenomenon: Afghanistan 1994–97* 59 (1999). Thus, Lindh has not carried his burden to show that the Taliban had the requisite hierarchical military structure.

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Similarly, it appears the Taliban typically wore no distinctive sign that could be recognized by opposing combatants; they wore no uniforms or insignia and were effectively indistinguishable from the rest of the population.[37] The requirement of such a sign is critical to ensure that combatants may be distinguished from the non-combatant, civilian population. Accordingly, Lindh cannot establish the second criterion.

Next, although it appears that Lindh and his cohorts carried arms openly in satisfaction of the third criterion for lawful combatant status, it is equally apparent that members of the Taliban failed to observe the laws and customs of war. *See* GPW, art. 4(A)(2). Thus, because record evidence supports the conclusion that the Taliban regularly targeted civilian populations in clear contravention of the laws and customs of war,[38] Lindh cannot meet his burden concerning the fourth criterion.[39]

In sum, the President's determination that Lindh is an unlawful combatant and thus ineligible for immunity is controlling here (i)

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[37] *See* Greg Jaffe & Neil King, Jr., *U.S. Says War is Working, but Taliban Remains,* Wall St. J., Oct. 26, 2001, at A3.

[38] *See* Michael Griffin, *Reaping the Whirlwind: The Taliban Movement in Afghanistan* 177–78 (2001) ("On 9 and 10 September [1997], Taliban troops lined up and shot 100 Shia civilians in the villages of Qazelbad and Qul Mohammad. . . ."); Neamatollah Nojumi, *The Rise of the Taliban in Afghanistan: Mass Mobilization, Civil War, and the Future of the Region* 229 (2002) ("Witnesses and international aid workers . . . have provided detailed accounts of the mass killings, in which Taliban troops were repeatedly described as rounding up unarmed men and boys from their homes and work sites and shooting them in the head.").

[39] What matters for determination of lawful combatant status is not whether Lindh personally violated the laws and customs of war, but whether the Taliban did so. *See* GPW, art. 4

because that determination is entitled to deference as a reasonable interpretation and application of the GPW to Lindh as a Taliban; (ii) because Lindh has failed to carry his burden of demonstrating the contrary; and (iii) because even absent deference, the Taliban falls far short when measured against the four GPW criteria for determining entitlement to lawful combatant immunity.

d. Consideration by Inter-American Commission on Human Rights

On March 12, 2002, the Inter-American Commission on Human Rights adopted precautionary measures requesting the United States "to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal . . . in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights." Letter from Juan Mendez, President of the Inter-American Commission on Human Rights Rights, to Colin Powell, U.S. Secretary of State (March 12, 2002). The IACHR decision is reprinted at 41 I.L.M. 532 (May 2002). The action was in response to a February 25, 2002, request seeking "the urgent intervention of the Inter-American Commission on Human Rights ("Commission") in order to prevent continued unlawful acts that threaten the rights of [individuals captured in Afghanistan who now are being] detained by the United States government at its military base at [Guantanamo]."

The United States filed its response to the request for precautionary measures on April 4, and an additional response on July 15, 2002. In its responses, the United States argued that the detention of enemy combatants by states in time of armed conflict is not subject to review by the Commission and that the Commission lacked jurisdiction to issue precautionary measures in the case. Excerpts from the July 15 response set forth below include the U.S. arguments that the laws of armed conflict and human rights are distinct bodies of law, that the facts underlying the

detention of the enemy combatants at Guantanamo are central to understanding the limited jurisdiction of the Commission in this case; and that the Commission does not have the requisite jurisdictional competence to apply international humanitarian law. U.S. arguments concerning the Commission's lack of a mandate to request the United States to implement precautionary measures and that, even if the Commission had such authority, such measures would not be binding, are provided in Chapter 6.A.2. The U.S. response did not address the merits of the petition and reserved its right to do so at a later date.

The full texts of the U.S. responses are available at *www.state.gov/s/l/c8183.htm*.

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I. THE UNCHALLENGED STATE PRACTICE OF DETAINING ENEMY COMBATANTS IN TIME OF ARMED CONFLICT IS NOT SUBJECT TO REVIEW BY THE COMMISSION

A. The Laws of Armed Conflict and Human Rights are Distinct Bodies of Law

The detention of enemy combatants in Guantanamo arises out of the war against terrorism. Yet in presenting their case, the Petitioners ignore this crucial context, suggesting that the detainees are akin to common criminals whose cases are entitled to "judicial review," Petitioners' Observations, at 21, or who enjoy the right "to resort to the courts to ensure respect for their legal rights," Petitioners Observations, at 15. Petitioners present no legal support for the position that detained enemy combatants have any right *under the law of armed conflict* to have their detention reviewed by the Commission or to enjoy access to the courts of the Detaining Power to challenge their detention.

Put simply, the Commission's jurisdiction does not include the application of the law of armed conflict, 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. And some of the principles of the law of armed conflict may be explicated by analogy or by reference to human rights principles. Yet the Petitioners confuse an overlap of *principles* with an overlap of *jurisdiction*. To say that both human rights law and law of armed conflict draw on similar principles of treatment is not to say that bodies with jurisdiction over the one law have jurisdiction over the other.

The Petitioners' confusion on this score is most evident when arguing that "[t]he United States improperly segregates the doctrinal bodies of international human rights law and international humanitarian law." Petitioners' Observations, at 13. Petitioners argue that these bodies of law are "complimentary [*sic*] and overlapping," *id.*, and they assert boldly that the U.S. position is "*uniformly rejected* by human rights experts." *Id.*, at 14 (emphasis added). Yet even the leading expert cited by Petitioners, in the very article cited in the Petitioners' Observations, presents a starkly different picture of the relationship between the two areas of law than the one suggested by Petitioners. In that article, Professor Theodor Meron, one of the world's leading scholars of the laws of armed conflict and human rights and currently a judge on the International Criminal Tribunal for the Former Yugoslavia in The Hague, writes:

> 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.*[4]

[4] Theodor Meron, *The Humanization of Humanitarian Law,* 94 A.J.I.L. 239, 240 (2000) (emphasis added).

The consequences of conflating the two bodies of law would be startling. For instance, application of human rights norms as suggested by Petitioners 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. . . ."[5]

B. The Facts Underlying the Detention of the Enemy Combatants at Guantanamo are Central to Understanding the Limited Jurisdiction of the Commission in this Case

A summary of the facts that have necessitated the detention of the enemy combatants at Guantanamo illustrates the gap between the Petitioners' view of the authority of the Commission and the reality of the Commission's human rights law jurisdiction.

On September 11, 2001, the terrorist forces with which the enemy combatants at Guantanamo associate themselves committed an unprecedented and horrific armed attack upon the United States. This coordinated attack left thousands dead in New York City, Pennsylvania and the Pentagon near Washington, D.C. The attacks, organized and calculated to cause massive numbers of deaths and serious injuries to civilians and destruction to civilian property, were of such scale and effects that numerous States, international and regional organizations, including the United Nations, NATO and the OAS, immediately condemned them in the strongest possible terms. *See* U.S. Response, at 8–9.

The terrorist attacks of September 11 were not ordinary criminal acts. They were carefully coordinated and of unprecedented scale. They were carried out by shadowy forces in several countries and continents that exploited the culture of freedom to carry out their attacks. They were conceived, directed and protected in the safe harbor of Taliban-run areas of Afghanistan.

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[5] *Id.*

The international community has clearly recognized the right of the United States and allied forces to resort to armed force in self-defense in response to these attacks. For instance, the United Nations explicitly recognized the "inherent right of individual and collective self-defence" immediately following September 11.[6] It is in this context that NATO and others recognized that the September 11 attacks constituted an "armed attack,"[7] a conclusion inherent in the UN Security Council's recognition of the right of self-defense.

It is in this context that President Bush, on October 7, 2001, ordered U.S. armed forces to initiate military action in self-defense against the terrorists and their supporters in Afghanistan. The actions, which continue to this day, are "designed to prevent and deter further attacks on the United States."[9] During the course of hostilities, the U.S. military and allied military forces have captured or secured the surrender of thousands of individuals fighting as part of the al Qaida terrorist network or in support of it. The U.S. military has taken control of many such persons and transferred some of them to Guantanamo.

The U.S. Response described the legal status of the detainees at Guantanamo. *See* Response, at 10–14. In short, "neither the Taliban nor al-Qaida detainees are entitled to POW status."[10] The detainees are not POWs because they do not meet the criteria

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[6] UNSC Res. 1368, UN Doc. No. S/RES/1368 (Sept. 12, 2001). *See also* the statement of Foreign Ministers of the States Parties to the 1947 Inter-American Treaty of Reciprocal Assistance ("the Rio Treaty"), declaring that "the measures being applied by the United States of America and other states in the exercise of their inherent right of individual and collective self-defense have the full support of the [S]tates [P]arties to the Rio Treaty." Meeting of Consultation of Ministers of Foreign Affairs, Committee for Follow-Up to the Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs (Rio Treaty), OEA/Ser.F/II.24, CS/TIAR/RES. 1/01, Oct. 16, 2001, at *http://www.oas.org/* (visited July 11, 2002).

[7] Statement on October 2, 2001, by NATO Secretary General Lord Robertson, at *http://www.nato-otan.org/terrorism/index.htm* (visited April 5, 2001).

[9 [sic]] "Article 51" Letter from John Negroponte, U.S. Permanent Representative to the U.N., to Richard Ryan, President of the Security Council, U.N. Doc. No. S/2001/946 (Oct. 7, 2001).

[10] *See* White House Fact Sheet, Feb. 7, 2002, at 1.

applicable to lawful combatants.[11] The Petitioners claim that "international humanitarian law currently does not recognize the status of 'unlawful combatant.'" Petitioners' Observations, at 16. Yet the United States has demonstrated that the status of unlawful combatant not only has a firm basis in international law, but is the appropriate characterization of the detainees at Guantanamo.[12] The Petitioners' chosen paradigm of human rights law is inapplicable to the circumstances of armed conflict in which the detentions at Guantanamo arise.

C. The Commission Does Not Have the Requisite Jurisdictional Competence to Apply International Humanitarian Law

As described in detail in the U.S. Response and in the sections above, the United States believes that the Commission lacks the jurisdictional competence to apply the law of armed conflict. Although the Petitioners phrase their argument in multiple ways, the essence of Petitioners' argument is that the jurisprudence of the Inter-American system allows for humanitarian law principles and treaties to be taken into account as elements for the interpretation of the American Convention by the Commission and the Court. Petitioners' Observations, at 6–9. In making this argument, however, Petitioners ignore (1) the difference between the scope of authority of the Court and the Commission and (2) the difference between States Parties to the American Convention and non-States Parties to the Convention.

The American Convention specifically authorizes the Court to examine other human rights treaties, but nothing in the American Declaration or the OAS Charter provides the Commission with similar authority vis-à-vis non-States Parties to the Convention. Article 64(1) of the Convention provides in relevant part that:

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[11] *See* U.S. Response, at 10–11.

[12] *See* U.S. Response, at 11, note 4 and accompanying text. *See also* Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 A.J.I.L. 328, 335 (2002).

> The Member States of the Organization may consult the court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. [Emphasis Added].

The Court construed that provision as permitting it to render advisory opinions interpreting other human rights treaties re-gardless of their extra-hemispheric origin and the fact that non-American States may become parties to them.[13] But in the *Las Palmeras Case*, the Court refused to uphold the application of humanitarian law by the Commission in finding a violation by Colombia of the Geneva Conventions.[14] Although the Court later reaffirmed that proposition in the *Bamaca Valasquez Case*, it decided that it would have the ability to "observe":

> that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the Geneva Conventions and, in particular, common Article 3.[15]

But in stating this, the Court specifically grounded its ability to do so on "treaties that they do have competence to apply."[16]

Petitioners are in error in interpreting these cases as supportive of the proposition that the Court has recognized a power in the Commission to interpret and apply a humanitarian law treaty if it deems it pertinent to its human rights responsibilities. First, it

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[13] *Other Treaties Subject to the Advisory Jurisdiction of the Court (Art. 64, American Convention on Human Rights)*, Advisory Opinion of Sept. 24, 1982, OC-1/82.

[14] *Las Palmeras Case*, Judgment of Feb. 4, 2000, Preliminary Objections, No. 67.

[15] *Bamaca Velasquez Case*, Judgment of Nov. 25, 2000, Ser. C no. 70, para 208.

[16] The Court also stated: "as already indicated in the *Las Palmeras Case* (2000), the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention." *Id.*, at para 209.

is essential to bear in mind that the Court was construing a provision in the American Convention on Human Rights in all the cases—not the American Declaration. Second, there is no analog to Article 64 in the American Declaration; nor is there any other textual reference in the Declaration to "other treaties." It therefore follows that, at best, whatever the import of the Court's opinions, they only apply to parties to the American Convention. Third, Article 64 provides authority for the Court—not the Commission—to be consulted regarding interpretation of "other treaties" concerning the protection of human rights. The Court's decisions did not expand the powers of the Commission, under the American Declaration, to interpret and apply law of war instruments in individual cases.

European bodies for the protection of human rights have also been restrained in looking at questions of detention during armed conflict. For example, the European Commission of Human Rights considered the detention of POWs by the Turkish army in the Cyprus case. It took "account of the fact that both Cyprus and Turkey are Parties to the [Third] Geneva Convention of 12 August 1949, relative to the treatment of prisoners of war, and that, in connection with the events in the summer of 1974, Turkey in particular assured the International Committee of the Red Cross (ICRC) of its intention to apply the Geneva Convention and its willingness to grant all necessary facilities for humanitarian action. . . ."[18] The Commission therefore did not find it necessary to "examine the question of a breach of Article 5 of the European Convention with regard to persons accorded the status of prisoners of war."[19] A more recent European human rights treaty has been more explicit in their rejection of a mandate in situations covered by the laws of war. Article 17(3) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[20] provides that the Committee

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[18] [sic] *Cyprus v. Turkey*, Report of the Commission, 4 E.H.R.R. 482, para 313 (July 10, 1976).

[19] *Id.*

[20] *Done at* Strasbourg, Nov. 26, 1987, *entered into force*, Feb. 1, 1989, E.T.S. No. 126, *reprinted in* 27 I.L.M. 1157 (1986).

"shall not visit places which representatives of delegates of Protecting Powers of the International Committee of the Red Cross effectively visit on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977 thereto."

While it may be true that the UN bodies, the European Commission, the European Torture Committee, and this Commission do not have identical mandates, it is telling that their mandates were obviously framed to limit those human rights bodies from issuing authoritative decisions in the area of law of war, which have been traditionally governed by instruments such as the Geneva Conventions. This comparative international practice provides further grounds for concluding that the authority to address issues regarding the interpretation of the law of war cannot be regarded as incidental or appropriate to a human rights body's consideration of a complaint.

The Petitioners' reliance on the Commission's earlier jurisprudence is also misplaced, in particular its contention that the "most relevant" precedent "both factually and legally" of the Commission is *Coard*. Petitioners' Observations, at 9, citing *Coard et al. v. United States*, Case 10.951, Inter-Am. C.H.R. Report No. 109/99 (1999). That decision demonstrates all too clearly the fundamental limitations and contradictions inherent in the Commission's statutory competence when it seeks to apply strictly the human rights norms of the American Declaration to situations, such as Grenada, in which the Commission is asked to review the actions taken by the military forces of a State in a situation involving international armed conflict. The practical results of the *Coard* decision turn logic on its head.[21] The *Coard* decision, in effect, found that the U.S. violated the American Declaration because it failed to take the Petitioners before Grenadian courts to determine the validity of their detention, even when the courts were not functioning. The decision also faulted the United States for failing

[21] The United States already explained in detail why the Commission *Coard's* decision is incorrect. *See* U.S. Response, at 21–23. *Coard* rests on the incorrect assumptions that human rights law is equally applicable during armed conflict and takes precedence over international humanitarian law.

to release Petitioners back into Grenadian society, although they clearly posed a danger (subsequently convicted of murder). Even if the Commission were tempted to rely upon the *Coard* reasoning, however, it is readily distinguishable because the Commission found that "the [P]etitioners in *Coard* were held by U.S. forces both during and after the cessation of hostilities." Petitioners' Observations, at 11–12, citing *Coard,* para 57. In the present case, the detainees are being held in an armed conflict that is ongoing.[22]

B. ARMS CONTROL

1. Agreements with Russia

a. Moscow Treaty

On May 24, 2002, in Moscow, President George W. Bush and Russian President Vladimir Putin signed the Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions ("Moscow Treaty"). The treaty committed the two nations to reduce and limit strategic nuclear warheads, "so that by December 31, 2012 the aggregate number of such warheads does not exceed 1700–2200 for each." It also provided that the Strategic Arms Reduction Treaty ("START") continue in force unchanged, and established a bilateral implementation commission to implement the treaty.

On June 20, 2002, the President transmitted the Moscow Treaty to the Senate for advice and consent to ratification. S. Treaty Doc. No. 107–8 (2002). Excerpts below from the letter of transmittal from the President to the Senate and from the report of the Secretary of State submitting the treaty to the President explain the significance of the Moscow Treaty.

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[22] *See* U.S. Response, at 22–23; *see also* Petitioners' Observations, at 12.

LETTER OF TRANSMITTAL

The White House, June 20, 2002

To the Senate of the United States:

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The Moscow Treaty represents an important element of the new strategic relationship between the United States and Russia. It will take our two nations along a stable, predictable path to substantial reductions in our deployed strategic nuclear warhead arsenals by December 31, 2012. When these reductions are completed, each country will be at the lowest level of deployed strategic nuclear warheads in decades. This will benefit the peoples of both the United States and Russia and contribute to a more secure world.

The Moscow Treaty codifies my determination to break through the long impasse in further nuclear weapons reductions caused by the inability to finalize agreements through traditional arms control efforts. In the decade following the collapse of the Soviet Union, both countries' strategic nuclear arsenals remained far larger than needed, even as the United States and Russia moved toward a more cooperative relationship. On May 1, 2001, I called for a new framework for our strategic relationship with Russia, including further cuts in nuclear weapons to reflect the reality that the Cold War is over. On November 13, 2001, I announced the United States plan for such cuts—to reduce our operationally deployed strategic nuclear warheads to a level of between 1700 and 2200 over the next decade. I announced these planned reductions following a careful study within the Department of Defense. That study, the Nuclear Posture Review, concluded that these force levels were sufficient to maintain the security of the United States. In reaching this decision, I recognized that it would be preferable for the United States to make such reductions on a reciprocal basis with Russia, but that the United States would be prepared to proceed unilaterally.

My Russian counterpart, President Putin, responded immediately and made clear that he shared these goals. President Putin and I agreed that our nations' respective reductions should be

recorded in a legally binding document that would outlast both of our presidencies and provide predictability over the longer term. The result is a Treaty that was agreed without protracted negotiations. This Treaty fully meets the goals I set out for these reductions.

It is important for there to be sufficient openness so that the United States and Russia can each be confident that the other is fulfilling its reductions commitment. The Parties will use the comprehensive verification regime of the Treaty on the Reduction and Limitation of Strategic Offensive Arms (the "START Treaty") to provide the foundation for confidence, transparency, and predictability in further strategic offensive reductions. In our Joint Declaration on the New Strategic Relationship between the United States and Russia, President Putin and I also decided to establish a Consultative Group for Strategic Security to be chaired by Foreign and Defense Ministers. This body will be the principal mechanism through which the United States and Russia strengthen mutual confidence, expand transparency, share information and plans, and discuss strategic issues of mutual interest.

The Moscow Treaty is emblematic of our new, cooperative relationship with Russia, but it is neither the primary basis for this relationship nor its main component. The United States and Russia are partners in dealing with the threat of terrorism and resolving regional conflicts. There is growing economic interaction between the business communities of our two countries and ever-increasing people-to-people and cultural contacts and exchanges. The U.S. military has put Cold War practices behind it, and now plans, sizes, and sustains its forces in recognition that Russia is not an enemy, Russia is a friend. Military-to-military and intelligence exchanges are well established and growing.

The Moscow Treaty reflects this new relationship with Russia. Under it, each Party retains the flexibility to determine for itself the composition and structure of its strategic offensive arms, and how reductions are made. This flexibility allows each Party to determine how best to respond to future security challenges.

There is no longer the need to narrowly regulate every step we each take, as did Cold War treaties founded on mutual suspicion and an adversarial relationship.

In sum, the Moscow Treaty is clearly in the best interests of the United States and represents an important contribution to U.S. national security and strategic stability. I therefore urge the Senate to give prompt and favorable consideration to the Treaty, and to advise and consent to its ratification.

George W. Bush.

LETTER OF SUBMITTAL

The Secretary of State,
Washington

The President,
The White House.

The President:

* * * *

REDUCTION REQUIREMENTS

The United States and Russia both intend to carry out strategic offensive reductions to the lowest possible levels consistent with their national security requirements and alliance obligations, and reflecting the new nature of their strategic relations. The Treaty requires the United States and Russia to reduce and limit their strategic nuclear warheads to 1700–2200 each by December 31, 2012, a reduction of nearly two-thirds below current levels. The United States intends to implement the Treaty by reducing its operationally deployed strategic nuclear warheads to 1700–2200 through removal of warheads from missiles in their launchers and from heavy bomber bases, and by removing some missiles, launchers, and bombers from operational service.

For purposes of this Treaty, the United States considers operationally deployed strategic nuclear warheads to be reentry vehicles on intercontinental ballistic missiles (ICBMs) in their launchers, reentry vehicles on submarine-launched ballistic missiles (SLBMs) in their launchers onboard submarines, and nuclear armaments loaded

on heavy bombers or stored in weapons storage areas of heavy bomber bases. In addition, a small number of spare strategic nuclear warheads (including spare ICBM warheads) are located at heavy bomber bases. The United States does not consider these spares to be operationally deployed strategic nuclear warheads. In the context of this Treaty, it is clear that only "nuclear" reentry vehicles, as well as nuclear armaments, are subject to the 1700–2200 limit.

RELATIONSHIP TO START

The Strategic Arms Reduction Treaty (START) continues in force unchanged by this Treaty. In accordance with its own terms, START will remain in force until December 5, 2009, unless it is superseded by a subsequent agreement or extended.

START's comprehensive verification regime will provide the foundation for confidence, transparency and predictability in further strategic offensive reductions. As noted in the May 24 Joint Declaration on the New Strategic Relationship, other supplementary measures, including transparency measures, may be agreed in the future.

BILATERAL IMPLEMENTATION COMMISSION

The Treaty establishes a Bilateral Implementation Commission (BIC), a diplomatic consultative forum that will meet at least twice a year to discuss issues related to implementation of the Treaty. The BIC will be separate and distinct from the Consultative Group for Strategic Security, established by the Joint Declaration of May 24, which will be chaired by Foreign and Defense Ministers with the participation of other senior officials.

* * * *

STATUS OF START II TREATY

The START II Treaty, which was signed in 1993, and to which the Senate gave its advice and consent in 1996, never entered into

force because Russia placed unacceptable conditions on its own ratification of START II. Russia's explicit linkage of START II to preservation of the ABM Treaty and entry into force of several agreements, signed in 1997, which related to ABM Treaty succession and ABM/TMD demarcation, made it impossible for START II to enter into force. With signature of the Moscow Treaty, the United States and Russia have now taken a decisive step beyond START II.

* * * *

b. Congressional testimony on Moscow Treaty

On July 9, 2002, Secretary of State Colin L. Powell testified in support of the Moscow Treaty before the Senate Foreign Relations Committee. In addition to areas covered in the transmittal documents, Secretary Powell addressed concerns that the Moscow Treaty did not require destruction of nuclear warheads, as set forth in excerpts below.

The full text of Secretary Powell's testimony is available at *www.state.gov/secretary/rm/2002/11735.htm*.

Mr. Chairman, the Treaty you have before you is different from Cold War arms control agreements because:

- It does not call for exact equality in numbers of strategic nuclear warheads. It is no longer appropriate to size our military capabilities against any single country or threat, and the end of superpower competition and adversarial style arms control negotiations has removed any political requirement for strict parity.
- It does not contain any sublimits or bans on categories of strategic forces. The need for a highly regimented strategic forces structure was the product of now outdated concepts of strategic stability that were necessary when we needed to regulate the interaction of the strategic forces of two hostile nations to reduce the structural incentives for beginning a nuclear war. Now we have nothing to go to war about.

- The Treaty does not contain its own verification provisions. United States security and the new strategic relationship with Russia do not require such provisions.

* * * *

Some have expressed concern that the Moscow Treaty does not require the destruction of warheads. No previous arms control treaty—SALT, START or INF—has required warhead elimination. Contrary to what was frequently reported in the press, the Russians did not propose a regime for verifiable warhead elimination during the negotiations. Given the uncertainties we face, and the fact that we, unlike Russia, do not manufacture new warheads, the United States needs the flexibility to retain warheads removed from operational deployment to meet unforeseen future contingencies and possible technical problems with the stockpile. That said, the Moscow Treaty does not prevent the United States and Russia from eliminating warheads and we anticipate that both Parties will continue to do so. For our part, some of these warheads will be used as spares, some will be stored, and some will be destroyed. Economics, our new strategic relationship with Russia, obsolescence, and the overall two-thirds cut in U.S. and Russian inventories mandated by the Treaty will undoubtedly result in continued warhead elimination.

* * * *

c. Joint Declaration on the New Strategic Relationship

As noted in President Bush's letter transmitting the Moscow Treaty to the Senate, *supra*, Presidents Bush and Putin also issued the Joint Declaration on the New Strategic Relationship between their two countries on May 24, 2002. The two countries declared their cooperation in political, economic, and social matters, and committed themselves to joint efforts in arms control and non-proliferation. Excerpts below provide the foundation for cooperation and commitments on non-proliferation and arms control.

The full texts of the joint declaration, the Moscow Treaty, and related documents are available at *www.state.gov/t/ac/trt/18016.htm*.

Joint Declaration on the New Strategic Relationship

The United States of America and the Russian Federation,

* * * *

Declare as follows:

A Foundation for Cooperation

We are achieving a new strategic relationship. The era in which the United States and Russia saw each other as an enemy or strategic threat has ended. We are partners and we will cooperate to advance stability, security, and economic integration, and to jointly counter global challenges and to help resolve regional conflicts.

To advance these objectives the United States and Russia will continue an intensive dialogue on pressing international and regional problems, both on a bilateral basis and in international fora, including in the UN Security Council, the G-8, and the OSCE. Where we have differences, we will work to resolve them in a spirit of mutual respect.

We will respect the essential values of democracy, human rights, free speech and free media, tolerance, the rule of law, and economic opportunity.

We recognize that the security, prosperity, and future hopes of our peoples rest on a benign security environment, the advancement of political and economic freedoms, and international cooperation.

The further development of U.S.-Russian relations and the strengthening of mutual understanding and trust will also rest on a growing network of ties between our societies and peoples. We will support growing economic interaction between the business communities of our two countries and people-to-people and cultural contacts and exchanges.

* * * *

Preventing the Spread of Weapons of Mass Destruction: Non-Proliferation and International Terrorism

The United States and Russia will intensify joint efforts to confront the new global challenges of the twenty-first century, including combating the closely linked threats of international terrorism and the proliferation of weapons of mass destruction and their means of delivery. We believe that international terrorism represents a particular danger to international stability as shown once more by the tragic events of September 11, 2001. It is imperative that all nations of the world cooperate to combat this threat decisively. Toward this end, the United States and Russia reaffirm our commitment to work together bilaterally and multilaterally.

The United States and Russia recognize the profound importance of preventing the spread of weapons of mass destruction and missiles. The specter that such weapons could fall into the hands of terrorists and those who support them illustrates the priority all nations must give to combating proliferation.

To that end, we will work closely together, including through cooperative programs, to ensure the security of weapons of mass destruction and missile technologies, information, expertise, and material. We will also continue cooperative threat reduction programs and expand efforts to reduce weapons-usable fissile material. In that regard, we will establish joint experts groups to investigate means of increasing the amount of weapons-usable fissile material to be eliminated, and to recommend collaborative research and development efforts on advanced, proliferation-resistant nuclear reactor and fuel cycle technologies. We also intend to intensify our cooperation concerning destruction of chemical weapons.

The United States and Russia will also seek broad international support for a strategy of proactive non-proliferation, including by implementing and bolstering the Treaty on the Non-Proliferation of Nuclear Weapons and the conventions on the prohibition of chemical and biological weapons. The United States and Russia call on all countries to strengthen and strictly enforce export controls, interdict illegal transfers, prosecute violators, and tighten border controls to prevent and protect against proliferation of weapons of mass destruction.

Missile Defense, Further Strategic Offensive Reductions, New Consultative Mechanism on Strategic Security

The United States and Russia proceed from the Joint Statements by the President of the United States of America and the President of the Russian Federation on Strategic Issues of July 22, 2001 in Genoa and on a New Relationship Between the United States and Russia of November 13, 2001 in Washington.

The United States and Russia are taking steps to reflect, in the military field, the changed nature of the strategic relationship between them.

The United States and Russia acknowledge that today's security environment is fundamentally different than during the Cold War.

In this connection, the United States and Russia have agreed to implement a number of steps aimed at strengthening confidence and increasing transparency in the area of missile defense, including the exchange of information on missile defense programs and tests in this area, reciprocal visits to observe missile defense tests, and observation aimed at familiarization with missile defense systems. They also intend to take the steps necessary to bring a joint center for the exchange of data from early warning systems into operation.

The United States and Russia have also agreed to study possible areas for missile defense cooperation, including the expansion of joint exercises related to missile defense, and the exploration of potential programs for the joint research and development of missile defense technologies, bearing in mind the importance of the mutual protection of classified information and the safeguarding of intellectual property rights.

The United States and Russia will, within the framework of the NATO-Russia Council, explore opportunities for intensified practical cooperation on missile defense for Europe.

The United States and Russia declare their intention to carry out strategic offensive reductions to the lowest possible levels consistent with their national security requirements and alliance obligations, and reflecting the new nature of their strategic relations.

A major step in this direction is the conclusion of the Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions.

In this connection, both sides proceed on the basis that the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms of July 31, 1991, remains in force in accordance with its terms and that its provisions will provide the foundation for providing confidence, transparency, and predictability in further strategic offensive reductions, along with other supplementary measures, including transparency measures, to be agreed.

The United States and Russia agree that a new strategic relationship between the two countries, based on the principles of mutual security, trust, openness, cooperation, and predictability requires substantive consultation across a broad range of international security issues. To that end we have decided to:

- establish a Consultative Group for Strategic Security to be chaired by Foreign Ministers and Defense Ministers with the participation of other senior officials. This group will be the principal mechanism through which the sides strengthen mutual confidence, expand transparency, share information and plans, and discuss strategic issues of mutual interest; and
- seek ways to expand and regularize contacts between our two countries' Defense Ministries and Foreign Ministries, and our intelligence agencies.

d. Anti-Ballistic Missile Treaty and START II

The U.S. withdrawal from the Anti-Ballistic Missile Treaty, 23 U.S.T. 3435 (1972), became effective on June 14, 2002, in accordance with the terms of article XV of that treaty. *See* 38 WEEKLY COMP. PRES. DOC. 1011 (June 13, 2002); *see also Digest 2001* at 829–833. In December 2002, President Bush announced that the United States would begin deploying a limited system to defend the United States against ballistic missiles by 2004. 38 WEEKLY COMP. PRES. DOC. 2172 (Dec. 17, 2002).

On June 15, 2002, the Russian Ministry of Foreign Affairs released a statement announcing that Russia "no longer

considers itself bound by the obligation, provided for under international law, to refrain from actions that could deprive [the START II Treaty] of its object and purpose." The Russian statement explained that it had ratified the START II Treaty and agreements relating to the ABM Treaty in May 2000, on the "mutual understanding . . . that the U.S. would act in a similar fashion." The full text of the Russian statement is available at *www.state.gov/t/ac/trt/18016.htm*.

The United States has not ratified the START II Treaty. As Secretary of State Colin Powell explained in his testimony before the Senate Foreign Relations Committee on the new Moscow Treaty, July 9, 2002, *see supra*, B.1.b, although the Senate gave advice and consent to the START II Treaty in 1996, it never entered into force because "Russia's explicit linkage of START II to preservation of the ABM Treaty and entry into force of several agreements, signed in 1997, which related to ABM Treaty succession and ABM/TMD [theater missile defense] demarcation, made it impossible for START II to enter into force. With signature of the Moscow Treaty, however, the United States and Russia have now taken a decisive step beyond START II that reflects the new era in United States-Russia relations."

2. Open Skies Treaty

On January 1, 2002, the Treaty on Open Skies, signed March 24, 1992, S. Treaty Doc. No. 102–37 (1992), entered into force. The Treaty established a regime of unarmed aerial observation flights over the entire territory of its 26 participants, providing for mutual and cooperative aerial observation. The United States signed the treaty, negotiated by the then-members of NATO and the Warsaw Pact, on March 24, 1992, and ratified it in 1993. Article XVII.2. provides that the treaty would enter into force 60 days after the deposit of 20 instruments of ratification, including those of the depositaries (Canada and Hungary) and of certain State Parties that had agreed to receive an annual quota of

eight or more observation flights over their territory as set forth in annex A to the treaty. With the ratification by Belarus and Russia in 2001, these requirements for entry into force were met. On August 14, 2002, the Department of State issued a fact sheet describing the purpose and function of the treaty.

The fact sheet is set forth below in full and is available at *www.state.gov/t/ac/rls/fs/12691.htm.*

Origin and Purpose

The Treaty on Open Skies establishes a regime of unarmed aerial observation flights over the entire territory of its participants. The Treaty is designed to enhance mutual understanding and confidence by giving all participants, regardless of size, a direct role in gathering information about military forces and activities of concern to them. Open Skies is the most wide-ranging international effort to date to promote openness and transparency of military forces and activities. The original concept of mutual aerial observation was proposed by President Eisenhower in 1955; the Treaty itself was an initiative of President George H.W. Bush in 1989. The Treaty was negotiated by the then-members of NATO and the Warsaw Pact, and was signed in Helsinki, Finland, on March 24, 1992. The United States ratified it in 1993. The Treaty entered into force on January 1, 2002.

Membership and Area of Application

The 26 States Parties to the Open Skies Treaty are: Belarus, Belgium, Bulgaria, Canada, Czech Republic, Denmark, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovak Republic, Spain, Turkey, United Kingdom, Ukraine, and United States. Kyrgyzstan has signed but not yet ratified. The Treaty depositaries are Canada and Hungary. The Open Skies regime covers the national territories—land, islands, and internal and territorial waters—of all the States Parties,

and thus includes the territory of most member states of the Organization for Security and Cooperation in Europe (OSCE). The Treaty is of unlimited duration and open to accession by other states as follows: (1) states of the former Soviet Union that have not already become States Parties to the Treaty may accede to it at any time; (2) other members of the OSCE may apply for accession to the Treaty at any time; (3) any other interested state may apply for accession to the Treaty six months after it enters into force (i.e., from July 1, 2002 onward). All applications for accession (i.e., categories 2 and 3 above) are subject to a consensus decision by the Open Skies Consultative Commission (OSCC), the Vienna-based organization charged with facilitating implementation of the Treaty, to which all States Parties belong. So far, the OSCC has approved applications for accession by Finland, Sweden, Lithuania, Latvia, Croatia, and Bosnia-Herzegovina— all of which are members of the OSCE.

Basic Elements of the Treaty

Territory. The Treaty specifies that all territory of the States Parties is open to observation on a reciprocal basis. Observed States Parties may restrict observation flights only for reasons of flight safety and not for reasons of national security.

Aircraft. Observation aircraft may be provided by either the observing state party or (the "taxi option") by the observed state party, at the latter's choice. All Open Skies aircraft and sensors must pass specific certification and pre-flight inspection procedures to ensure that they meet Treaty standards and that only Treaty-permitted sensors are installed. The official U.S. Open Skies aircraft is the OC-135B (a military version of the Boeing 707).

Sensors. Open Skies aircraft may have video, optical panoramic and framing cameras for daylight photography, infra-red line scanners for a day/night capability, and synthetic aperture radar for a day/night all weather capability. Photographic image quality will permit recognition of major military equipment (e.g., permit a State Party to distinguish between a tank and a truck), thus allowing significant transparency of military forces and activities. Sensor categories may be added and capabilities improved by

agreement among States Parties. All equipment used in Open Skies must be commercially available to all participants in the regime.

Quotas. Each State Party has agreed to an annual quota of observation flights it is willing to receive—its passive quota of observation flights. Each State Party may conduct as many observation flights—its active quota—as its passive quota. During the first three years after EIF, each State will be obliged to accept no more than seventy-five percent of its passive quota. Since the overall annual passive quota for the United States is 42, this means that it will be obligated to accept no more than 31 observation flights a year during this three-year period. Only 4 of the 31 potential flights over the United States were requested during the first year of Treaty operation, all by Russia/Belarus (which functions as a single country for quota allocation purposes). During this period (2002/03), the United States is entitled to 8 of the 31 annual flights available over Russia/Belarus. Additionally, the United States is entitled to one flight over Ukraine, to be shared with Canada.

Data Sharing/Availability. Collected imagery from Open Skies missions will be available to any State Party willing to pay the costs of reproduction. The Treaty provides that at the request of any State Party, the observing state will provide it a copy of the data collected during a mission over the observed state. As a result, the data available to each State Party is much greater than that which it can collect itself under the Treaty quota system.

Implementation of the Treaty

Provisional application of portions of the Treaty took place from signature in 1992 until entry into force in 2002. During that period, participants conducted joint trial flights for the purpose of training flight crews and testing equipment and sensors. Now that the Treaty has entered into force, formal observation flights have begun in August 2002—in accordance with the agreed distribution of active and passive quotas—starting with a Russian mission over the United Kingdom (August 6–9). During the fourth quarter of 2002, France, the UK, and Italy are also planning to conduct missions over Russia/Belarus.

Since the signature of the Open Skies Treaty in 1992, the security environment in Europe has changed significantly. Nevertheless, the Open Skies Treaty remains an important element of the European security structure, along with the Treaty on Conventional Armed Forces in Europe (CFE), and the Vienna Document 1999 Agreement on Confidence-and Security-Building Measures (CSBMS) under the auspices of the OSCE.

3. Compliance with Arms Limitation and Disarmament and Non-proliferation Agreements

On October 18, 2002, Joseph S. McGinnis, Acting Head of the U.S. Delegation to the First Committee of the 57th Session of the UN General Assembly, introduced resolution L.54, "Compliance with arms limitation and disarmament and non-proliferation agreements." His remarks are excerpted below. The UN General Assembly adopted the resolution by consensus on November 22, 2002. A/RES/57/86.

The full text of Mr. McGinnis' remarks is available at *www.state.gov/p/io/rls/rm/2002/14548pf.htm*.

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* * * *

This Committee and the UN General Assembly last addressed compliance issues when the U.S. offered a resolution on this subject in 1997. Since then, much has happened to emphasize even more urgently the need for compliance with arms limitation and disarmament and non-proliferation agreements. My remarks will focus on this heightened need to insure compliance with such agreements as an important way to insure international security and stability.

As Assistant Secretary Rademaker said in his address to this body on October 3rd, this is a time of great danger. The proliferation of weapons of mass destruction is an increasing reality along with the realization of the threats we will all face if terrorists gain access to such weapons. In this regard, the U.S. believes that every country in the world should be a party to the Nuclear Non-proliferation Treaty, the Biological Weapons Convention, and the

Chemical Weapons Convention. We also believe that every country that has signed and ratified these agreements should comply fully with their provisions, and that States Parties must hold each other accountable and take appropriate steps to deter violations. The international community must use all means at its disposal to ensure not just that key multilateral arms limitation and disarmament treaties are complied with, but also that we keep weapons of mass destruction and their means of delivery out of the hands of terrorists and states which may support terrorists.

The key means by which this is accomplished within the framework of such treaties and other agreements is by ensuring full compliance with their terms. The resolution I am introducing on behalf of my government seeks to reinforce that crucial fact. While the language in the resolution is based on previous versions of the resolution, it has been updated to reflect the new international security imperatives that we face today. In this regard, while compliance with all agreements is to be reinforced, special emphasis must be placed on compliance with non-proliferation agreements as a way to keep weapons of mass destruction from becoming a part of the arsenal of terrorism. We all would suffer grievously were this to happen.

I wish to emphasize that the sole purpose of the United States in presenting this resolution is to focus the attention of member states of the UN on the continuing need—now more urgent than ever—to comply with arms limitation and disarmament and non-proliferation agreements. As in previous years when this resolution was offered, and in the future when it is offered again, our objective is and will be to address compliance, pure and simple. No other resolution does this, and it is vital to consider this resolution in that light.

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In his address to the First Committee referred to in Mr. McGinnis' remarks, Assistant Secretary of State for Arms Control Stephen G. Rademaker made several additional points concerning the U.S. approach to treaty implementation in this area, noting in particular recent actions concerning

the leadership of the Organization for the Prohibition of Chemical Weapons.

The full text of Assistant Secretary Rademaker's remarks is available at *www.state.gov/t/ac/rls/rm/14161.htm*.

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We believe every country in the world should belong to the Nuclear Non-Proliferation Treaty, the Biological Weapons Convention, and the Chemical Weapons Convention ["CWC"]; that every country belonging to them should fully comply with their provisions; and that Parties must hold each other accountable and take appropriate steps to deter violations.

The universal adoption of the IAEA Additional Protocol would give us greater assurance of compliance with the [Non-Proliferation Treaty ("NPT")]. In this regard, I am pleased to report that earlier this year the President submitted to the United States Senate the U.S. Additional Protocol. Through IAEA safeguards and other means, the international community must sustain efforts to reduce the threat of diversion of nuclear materials, equipment, and technology.

The strong U.S. commitment to effective multilateral arms control is demonstrated by our actions over the past year with respect to the OPCW. When the United States and other parties to the CWC recognized that the [Organization for the Prohibition of Chemical Weapons ("OPCW")] was not being effectively administered, the politically expedient course would have been to remain silent while the CWC slowly atrophied. Indeed, many countries strongly counseled us to follow precisely such a course. We chose instead, however, to initiate efforts to revitalize the Organization. Now that the OPCW is under new leadership, we are confident that it can effectively enforce international norms with respect to chemical weapons, provided it receives sufficient support from the international community. Accordingly, the United States is making a voluntary contribution to the organization of some $2 million. In addition, we have decided to upgrade our diplomatic representation at the OPCW in The Hague. We urge other members to join us in making such voluntary contributions to the OPCW, and in taking other steps to underscore international

support for Director General Pfirter as he begins to revitalize this important institution of multilateral arms control.

Treaty Compliance Measures to assist in verification of compliance are key features of most traditional arms control regimes, which often include provisions for declarations, inspections, and even the establishment of implementation bodies. There are instances, such as biological weapons, where other approaches are more appropriate, but in general it is the policy of the United States to support fully the efforts of such organizations as the IAEA and the OPCW. The international community must use all means at its disposal to ensure not just that key multilateral arms control treaties are complied with, but also that we keep weapons of mass destruction and their means of delivery out of the hands of terrorists and state sponsors of terrorists.

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4. Biological Weapons Convention

a. Fifth Review Conference of States Parties

The Fifth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, signed April 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S.163 (1972) ("Biological Weapons Convention"), originally convened on November 19, 2001. As decided by consensus at the adjournment of that session on December 7, 2001, the conference reconvened on November 11, 2002, in Geneva. At the conclusion of the resumed session, the conference decided by consensus to hold three annual meetings of the States Parties starting in 2003. As set forth in the decision of the Fifth Review Conference, November 14, 2002, the issues to be considered include:

i. the adoption of necessary national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation;

ii. national mechanisms to establish and maintain the security and oversight of pathogenic microorganisms and toxins;
iii. enhancing international capabilities for responding to, investigating and mitigating the effects of cases of alleged use of biological or toxin weapons or suspicious outbreaks of disease;
iv. strengthening and broadening national and international institutional efforts and existing mechanisms for the surveillance, detection, diagnosis and combating of infectious diseases affecting humans, animals, and plants;
v. the content, promulgation, and adoption of codes of conduct for scientists.

BWC/CONF.V/L.1 at 3–4, available at *www.brad.ac.uk/acad/sbtwc/btwc/rev_cons/5rc/5rc_conf.htm*.

Assistant Secretary of State for Arms Control Stephen G. Rademaker welcomed the outcome of the conference, stressing that "the problem of biological weapons is sufficiently grave that we cannot restrict our activities to this single forum. . . . There are many other efforts that we believe can be pursued with greater success in other venues and it is the policy of the United States to pursue the problem of biological weapons in all appropriate venues to the maximum degree practicable."

The U.S. delegation provided a fact sheet detailing U.S. efforts to combat the biological weapons threat, including relevant new U.S. legislation and other domestic measures, as well as efforts undertaken as part of NATO's Defense Group on Proliferation, the Australia Group, the G-8 Global partnership Against the Spread of Weapons and Materials of Mass Destruction, the Ottawa Group, the World Health Organization, the International Maritime Organization, and Organization for Security and Cooperation in Europe. The fact sheet is available at *www.state.gov/t/ac/rls/fs/15150.htm*.

b. U.S. position on Protocol to the Biological Weapons Convention

On August 26, 2002, Under Secretary of State for Arms Control and International Security John H. Bolton, speaking at the Tokyo America Center, explained the reasons for U.S. rejection of a draft Protocol to the Biological Weapons Convention.

The full text of Under Secretary Bolton's remarks is available at *www.state.gov/t/us/rm/13090.htm*.

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Some have questioned the U.S. commitment to combat the biological weapons threat due to our rejection of the draft BWC Protocol. Put simply, the draft Protocol would have been singularly ineffective. The United States rejected the draft protocol for three reasons: first, it was based on a traditional arms control approach that will not work on biological weapons; second, it would have compromised national security and confidential business information; and third, it would have been used by proliferators to undermine other effective international export control regimes.

Traditional arms control measures that have worked so well for many other types of weapons, including nuclear weapons, are not workable for biological weapons. Unlike chemical or nuclear weapons, the components of biological warfare are found in nature, in the soil, in the air and even inside human beings. The presence of these organisms does not necessarily connote a sinister motive. They are used for many peaceful purposes such as routine studies against disease, the creation of vaccines, and the study of defensive measures against a biological attack. Components of biological weapons are, by nature, dual use. Operators of clandestine offensive BW programs can claim any materials are for peaceful purposes or easily clean up the evidence by using no more sophisticated means than household bleach. Detecting violations is nearly impossible; proving a violation is impossible. Traditional arms control measures are based on detecting violations

and then taking action—military or diplomatic—to restore compliance. Traditional arms control measures are not effective against biology. Using them, we could prove neither non-compliance nor compliance.

Traditional arms control measures, in fact, applied to biological activities yield no benefit and actually do great harm. Declarations and investigations called for under the draft Protocol at industrial plants, scientific labs, universities, and defense facilities would have revealed trade secrets and sensitive bio-defense information. The United States invests over a billion dollars annually on bio-defense. The U.S. pharmaceutical and biotech industry leads the world; each year, U.S. industry produces more than 50 percent of the new medicines created. It costs an average of $802 million to bring a new product to market and takes between 12–15 years to do so. Such disclosures, intentionally or inadvertently, also could result in putting the men and women in uniform at increased risk to biological weapons attacks. Protective devices and treatments could be compromised.

The draft Protocol would also have put in jeopardy effective export control regimes. Countries such as Iran, Iraq, and Cuba have fought the hardest for free access to the technology, knowledge, and equipment necessary to pursue biological weapons. Their argument was simple: as States Parties to the BWC they should be allowed free trade in all biological materials. These countries sought to dismantle effective export control regimes such as the Australia Group. They argued that export controls should not be applied to BWC States Parties. The problem is that some BWC States Parties are pursuing biological warfare programs and it is no coincidence that these countries are also the ones pressing for access to sensitive technology. This "Trojan Horse" approach was not combated effectively by the draft Protocol. The result was a so-called "Cooperation Committee" whose job would have been to promote scientific and technological exchanges. The Cooperation Committee was touted as a way to appease Iran and Cuba. We viewed it as dangerous, harmful, and unnecessary. Protecting existing export control regimes is another important reason for the United States to reject the draft Protocol.

C. NON-PROLIFERATION

1. U.S. National Strategy to Combat Weapons of Mass Destruction

On December 10, 2002, President George W. Bush released the National Strategy to Combat Weapons of Mass Destruction. As explained in the introduction to the report, "[w]eapons of mass destruction (WMD)—nuclear, biological, and chemical—in the possession of hostile states and terrorists represent one of the greatest security challenges facing the United States. We must pursue a comprehensive strategy to counter this threat in all of its dimensions." As to nonproliferation sanctions, the report concluded:

> Sanctions can be a valuable component of our overall strategy against WMD proliferation. At times, however, sanctions have proven inflexible and ineffective. We will develop a comprehensive sanctions policy to better integrate sanctions into our overall strategy and work with Congress to consolidate and modify existing sanctions legislation.

The unclassified version of the report is available at *www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf*. *See also* discussion of national security strategy, A.4.a, *supra*.

2. Initiatives Aimed at Preventing the Proliferation of Weapons of Mass Destruction

a. U.S.-Russia: strengthening nuclear material protection

On June 18, 2002, President George W. Bush informed Congress that the emergency declared under § 202(d) of the National Emergencies Act, 50 U.S.C. 1622(d), with respect to the accumulation of weapons-usable fissile material in the territory of the Russian Federation would continue beyond June 21, 2002. 67 Fed. Reg. 42,181 (June 20, 2002).

> The notice issued by the President explained the role of this action in ensuring that fissile material removed from Russian nuclear weapons is dedicated to peaceful uses. The emergency provides the basis for the United States to continue to block and protect from attachment Russian property in the United States or under the control of U.S. persons that is directly related to the implementation of the agreements between the United States and Russia providing for the downblending of highly enriched uranium derived from nuclear weapons to low enriched uranium for peaceful commercial purposes. This action would protect such property from attachment or other judicial process. *See Digest 2001* at 847–848.

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On June 21, 2000, the President issued Executive Order 13159 (the "Order") blocking property and interests in property of the Government of the Russian Federation that are in the United States, that hereafter come within the United States, or that are or hereinafter come within the possession or control of United States persons that are directly related to the implementation of the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, dated February 18, 1993, and related contracts and agreements (collectively, the "HEU Agreements"). The HEU Agreements allow for the downblending of highly enriched uranium derived from nuclear weapons to low enriched uranium for peaceful commercial purposes. The Order invoked the authority, inter alia, of the International Emergency Economic Powers Act, 50 U.S.C. 1701 et seq., and declared a national emergency to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States posed by the risk of nuclear proliferation created by the accumulation of a large volume of weapons-usable fissile material in the territory of the Russian Federation.

A major national security goal of the United States is to ensure that fissile material removed from Russian nuclear weapons pursuant to various arms control and disarmament agreements is dedicated to peaceful uses (such as downblended to low enriched uranium for peaceful commercial uses), subject to transparency measures, and protected from diversion to activities of proliferation concern. Pursuant to the HEU Agreements, weapons-grade uranium extracted from Russian nuclear weapons is converted to low enriched uranium for use as fuel in commercial nuclear reactors. The Order blocks and protects from attachment, judgment, decree, lien, execution, garnishment, or other judicial process the property and interests in property of the Government of the Russian Federation that are directly related to the implementation of the HEU Agreements and 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.

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b. U.S.-Serbia

On August 23, 2002, the U.S. Department of State announced the successful transfer of highly-enriched weapons-quality uranium from the Vinca nuclear reactor near Belgrade to a facility in the Russian Federation to be down-blended for use as conventional nuclear fuel. Excerpts from a fact sheet describing "Project Vinca," released on the same day, are provided below.

The full text of the fact sheet is available at *www.state.gov/r/pa/prs/ps/2002/12962pf.htm*.

- To remove a potential target for theft or terrorist attack, the governments of the United States and Russia reached an agreement with the government of Serbia, endorsed by the Yugoslav government, to work with the International Atomic Energy Agency (IAEA) and the Nuclear Threat Initiative (NTI)

and the Russian Federation to remove a quantity of highly enriched uranium, sufficient to produce 2-1/2 nuclear weapons from a research reactor near downtown Belgrade.

- The 48 kilograms (over 100 pounds) of unirradiated fuel was flown out of Belgrade on August 22 and has been safely secured in Dmitrovgrad, Russia, where it will be "blended down" into low enriched uranium for use as commercial reactor fuel.
- The U.S. Department of State and the U.S. Department of Energy cooperated in the conduct of this project. The cost to the U.S. Government will be between $2–3 million—the State Department's Nonproliferation and Disarmament Fund contributed about $2 million and the Department of Energy provided technical expertise and costs associated with "blending down" the materials. Nuclear Threat Initiative is a private charitable foundation that helped catalyze the deal by providing $5 million in funding to address radioactive hazards at the Vinca Nuclear Institute. The U.S. Government lacks the authority to fund this critical element of the project.

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c. Russian Federation Debt for Nonproliferation Act of 2002

On September 30, 2002, authority to reduce Russian Soviet-era debt in exchange for Russian spending on nonproliferation was enacted as the Russian Federation Debt for Nonproliferation Act of 2002, Subtitle B, §§ 1311–1321 , of the Foreign Relations Authorization Act, Pub. L. No. 107–228, 116 Stat. 1350, 22 U.S.C. § 5952 note.

Section 1315 authorized the President "to enter into an agreement with the Russian Federation under which an amount equal to the value of the debt reduced pursuant to section 1314 will be used to promote the nonproliferation of weapons of mass destruction and the means of delivering such weapons. An agreement entered into under this section may be referred to as a "Russian Federation Nonproliferation Investment Agreement". Section 1314(a)(1) provided as follows:

> (1) In general.—Upon the entry into force of a Russian Federation Nonproliferation Investment Agreement, the President may reduce amounts of Soviet-era debt owed by the Russian Federation to the United States (or any agency or instrumentality of the United States) that are outstanding as of the last day of the fiscal year preceding the fiscal year for which appropriations are available for the reduction of debt, in accordance with this subtitle.

On July 25, 2002, Under Secretary of State for Economic, Business and Agricultural Affairs Alan P. Larson had testified before the House International Relations Committee concerning the possibility of using such debt exchange, as excerpted below.

Under Secretary Larson's testimony is available at *www.state.gov/e/rls/rm/2002/12190.htm.*

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The initiative allows each partner the flexibility to finance and carry out projects in a manner consistent with its program priorities, national laws and budgetary procedures. Bilateral debt for program exchange is an option for financing projects under the [G-8 Global] Partnership. We do not know at this point whether others will use debt exchange or more conventional assistance or a mix of both. We do know that debt exchange will be difficult for some of our partners. The Administration will consult closely with Congress on the formulation of non-proliferation and threat reduction programs and projects and on the choice between debt or more traditional assistance as a funding vehicle.

The Administration's concept for how a debt option might work is straightforward. The United States would agree in advance to waive collection of a given amount of debt payments owed by the Russian government to the United States government on Russia's Soviet-era debt. As a consequence, Russia would be able to make expanded budgetary expenditures for agreed non-proliferation activities. The financial and budget mechanics would be worked out in negotiations with Russia, subject to the

requirements of U.S. law. We know the Russian authorities are interested in applying such an approach to part or all of their Soviet-era debt to the United States. Beyond that, there are still many details that would need to be worked out. We need to determine under what conditions we could offer such an option to Russia. The Russians will need to decide whether such a deal would be advantageous for them, relative to other options.

I would like to highlight one point, that the Administration does not consider this kind of a financing vehicle as debt relief, per se. Financially, Russia does not require further debt relief. Since its financial crisis in 1998, Russia has adopted improved economic policies and has benefited from relatively high world oil prices. Although it remains a country with serious poverty and pressing needs, it can and is paying its bills.

At the same time, Russia cannot afford to do everything we would like it to do. In the wake of the breakup of the former Soviet Union, Russia chose to take over the assets and liabilities of the Soviet Union. This decision saddled Russia with a number of burdens, among them a vast and decaying collection of Soviet-era weapons and production facilities. In addition, Russia assumed the entire Soviet debt in exchange for title to all Soviet assets abroad. A decade later, these decisions and a changing global environment have left Russia with many responsibilities: to destroy chemical weapons in compliance with international obligations; to close down plutonium production facilities and dispose of excess fissile material; to dismantle old ballistic missile submarines and other strategic launch systems. It must secure remaining WMD or materials. These tasks remain despite U.S. assistance of $7 billion to Russia and other former Soviet states for these purposes.

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3. North Korean Nuclear Program

a. Violation of Agreed Framework

On October 16, 2002, Richard Boucher, spokesman for the Department of State, announced that North Korea had

acknowledged that it was conducting a clandestine uranium enrichment program to develop nuclear weapons in violation of the Agreed Framework, 34 I.L.M. 603 (1995), which it had signed with the United States in 1994, and other instruments. Under the Agreed Framework, North Korea was to halt all nuclear weapons development, and the United States undertook to organize an international consortium to finance and construct two nuclear power plants in North Korea and to supply 500,000 metric tons of heavy fuel oil per year while they were being built.

As recently as August 2002 the United States representative to the Korean Peninsula Energy Development Organization ("KEDO"), Ambassador Charles Pritchard, had reiterated the position of the United States in meeting its commitments under the Agreed Framework. At a ceremony marking the pouring of concrete for a light water reactor in Kumho, North Korea, Ambassador Pritchard stated:

> The Agreed Framework has been a key component of US-North Korea policy. When we agreed to the terms of the Agreed Framework, we did so with the full expectation that all aspects of our concerns over North Korea's nuclear program would be resolved finally and completely.
>
> As Administration officials have stated many times, the United States will continue to abide by the terms of this accord so long as North Korea does the same; we expect the DPRK to abide by the fact and the spirit of the agreement.
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>
> It is time for us to see the same kind of tangible progress by the DPRK in meeting its commitments under the Agreed Framework. Those commitments are to cooperate with the IAEA (International Atomic Energy Agency) and to come into compliance with the NPT (Nonproliferation Treaty). The path is clear, and the schedule is demanding.

> Under the schedule recently provided to the DPRK, KEDO is on course to complete a significant portion of the project and deliver key nuclear components in mid-2005, before which the DPRK is obligated to come into full compliance with its IAEA safeguards agreement, including taking all steps that may be deemed necessary by the IAEA. The IAEA believes that with full cooperation from the DPRK it will take at least 3–4 years to verify the completeness and correctness of North Korea's initial safeguards declaration. That means the DPRK must start meaningful cooperation now with the IAEA and to comply with its other obligations under the Agreed Framework.

The full text of Ambassador Pritchard's remarks is available at *http://usinfo.state.gov/regional/ea/easec/pritchard806.htm*.

North Korea's acknowledgment of the violation in October 2002 came in response to information provided by Assistant Secretary of State for East Asian and Pacific Affairs James Kelly during meetings October 3–5 in North Korea. At that time, Secretary Kelly informed North Korean officials that the United States had information indicating that North Korea had a program to enrich uranium for nuclear weaons in violation of the Agreed Framework.

The statement released by Mr. Boucher and excerpted below, called on North Korea to comply with its commitments under the Nonproliferation Treaty and to eliminate its nuclear weapons program in a verifiable manner.

The full text of Mr. Boucher's statement is available at *http://usinfo.state.gov/regional/ea/easec/af9.htm*.

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Earlier this month, senior U.S. officials traveled to North Korea to begin talks on a wide range of issues. During those talks, Assistant Secretary James A. Kelly and his delegation advised the North Koreans that we had recently acquired information that indicates that North Korea has a program to enrich uranium for nuclear weapons in violation of the Agreed Framework and other agree-

ments. North Korean officials acknowledged that they have such a program. The North Koreans attempted to blame the United States and said that they considered the Agreed Framework nullified. Assistant Secretary Kelly pointed out that North Korea had been embarked on this program for several years.

Over the summer, President Bush—in consultation with our allies and friends—had developed a bold approach to improve relations with North Korea. The United States was prepared to offer economic and political steps to improve the lives of the North Korean people, provided the North were dramatically to alter its behavior across a range of issues, including its weapons of mass destruction programs, development and export of ballistic missiles, threats to its neighbors, support for terrorism, and the deplorable treatment of the North Korean people. In light of our concerns about the North's nuclear weapons program, however, we are unable to pursue this approach.

North Korea's secret nuclear weapons program is a serious violation of North Korea's commitments under the Agreed Framework as well as under the Nonproliferation Treaty (NPT), its International Atomic Energy Agency safeguards agreement, and the Joint North-South Declaration on the Denuclearization of the Korean Peninsula.

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The United States and our allies call on North Korea to comply with its commitments under the Nonproliferation Treaty, and to eliminate its nuclear weapons program in a verifiable manner.

We seek a peaceful resolution of this situation. Everyone in the region has a stake in this issue and no peaceful nation wants to see a nuclear-armed North Korea. This is an opportunity for peace loving nations in the region to deal, effectively, with this challenge.

b. U.S. support for KEDO reaction

On November 14, 2002, KEDO announced that it had decided to suspend further shipment of fuel oil to North Korea

beginning in December. President George W. Bush welcomed the decision while reiterating his hope that the impasse with North Korea could be resolved peacefully.

The full text of President Bush's statement is available at *http://usinfo.state.gov/regional/ea/easec/bushkedo.htm*.

I welcome yesterday's strong statement by the Korean Peninsula Energy Development Organization (KEDO) on the need for North Korea to eliminate its nuclear weapons program and its decision to suspend further shipment of fuel oil to North Korea beginning in December. We are working closely with our partners in KEDO and our friends around the world to address this shared challenge.

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The United States hopes for a different future with North Korea. As I made clear during my visit to South Korea in February, the United States has no intention of invading North Korea. This remains the case today. The United States seeks friendship with the people of North Korea.

. . . We are united in our desire for a peaceful resolution of this situation. We are also united in our resolve that the only option for addressing this situation is for North Korea to completely and visibly eliminate its nuclear weapons program.

c. U.S. views on status of KEDO agreement and relations with North Korea

At a press briefing in Washington, D.C., on November 19, 2002, Assistant Secretary of State for East Asian and Pacific Affairs, James A. Kelly indicated that the United States had made no final decision on the status of the Agreed Framework. He also reiterated that there was no basis for North Korea's continued concern about challenges to its sovereignty by the United States.

The full text of the press briefing is available at *http://usinfo.state.gov/regional/ea/easec/kelly1120.htm.*

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QUESTION: . . . The US State Department has not officially announced that the [Agreed Framework] has been scrapped, but the United States recently suspended the fuel shipment to North Korea, which amounts to practical scrapping. . . . What is the official position of the State Department about the agreements?
ASSISTANT SECRETARY KELLY: First of all, the US did not announce the ending of the fuel shipments. That was announced by the Korean Peninsula Energy Development Organization board of directors, which includes the Republic of Korea, Japan, U.S. and the European Union, in New York, I believe, last Thursday.

The US view on the Agreed Framework is that the North Koreans said it was nullified and we guess it's been nullified. But we are not in any rush to make decisions on all aspects of it. This is an agreement that has acted for some eight years and there are a number of different elements to it.

Among other things, of course, its very first paragraph . . . asserts that it's aimed at preventing nuclear weapons on the Korean Peninsula, and that's, of course, exactly the uranium enrichment program that would constitute a violation of that. So no final decisions have been made and no final statements have been made by the US Government on that.

We did say that the current shipment that, I guess, is being delivered now in North Korea is the last one for which there are funds, and I think that statement speaks for itself.

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QUESTION: . . . Secretary Colin Powell yesterday said that United States recognized the sovereignty of North Korea. Is it your official position to recognize the North Korean Government or regime?
ASSISTANT SECRETARY KELLY: Yes. I don't want to get tangled in language about diplomatic recognition, but yes, we recognize they're a member-state of the United Nations. I don't

think that there's something else. We have a lot of serious problems with the government, but I think the context of what Secretary Powell said was really referring to all of the statements that have been coming from North Korea that keep talking about threats, and there really haven't been any threats.

When the President was in South Korea last February, and in some remarks since, he made clear that we had no intention or plans to attack or invade North Korea. They keep emphasizing a threat posture which simply does not exist, and their sovereignty has not been challenged. Their behavior has been what has been challenged and this violation of written treaties in pursuing the development of nuclear weapons.

d. Trilateral statement: United States, Republic of Korea and Japan

On October 26, 2002, President Bush, Republic of Korea President Kim Dae-Jung, and Japanese Prime Minister Junichiro Koizumi considered the North Korea situation in meetings held on the margins of the Asia-Pacific Economic Cooperation ("APEC") meetings in Los Cabos, Mexico. A joint statement issued by the three leaders stressed their commitment to resolving the matter peacefully and reaffirmed that continued close consultations and trilateral coordination remained vital to the success of their efforts towards North Korea. The statement also reflected President Bush's assertions that the United States had no intention of invading North Korea.

At the conclusion of the Los Cabos meeting, APEC issued a statement calling upon the DPRK "to visibly honor its commitment to give up nuclear weapons programs and reaffirm our commitment to ensure a peaceful resolution of this issue." *See http://usinfo.state.gov/regional/ea/easec/nkleaders26.htm*.

The full text of the trilateral statement is available at *http://usinfo.state.gov/regional/ea/apec/mexico/trilateral1026.html*

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The three leaders agreed that North Korea's program to enrich uranium for nuclear weapons is a violation of the Agreed Framework, the Non-Proliferation Treaty, North Korea's IAEA safeguards agreement, and the South-North Joint Declaration on Denuclearization of the Korean peninsula. The three leaders called upon North Korea to dismantle this program in a prompt and verifiable manner and to come into full compliance with all its international commitments in conformity with North Korea's recent commitment in the Japan-North Korea Pyongyang Declaration. In this context, the three leaders agreed to continue close coordination.

The three leaders stressed their commitment to resolve this matter peacefully in close consultation trilaterally and with other concerned nations around the globe.

The three leaders agreed that South-North dialogue and the opening of Japan-DPRK normalization talks can serve as important channels to call upon the North to respond quickly and convincingly to the international communities' demands for a denuclearized Korean peninsula. President Kim briefed that during the recent South-North Ministerial Meeting held in Pyongyang, the South strongly urged North Korea to take immediate action for a prompt and peaceful resolution of the nuclear issue. Prime Minister Koizumi reiterated that Japan-DPRK normalization should promote not only bilateral relations with North Korea, but also contribute to peace and stability of the region. In this regard, Prime Minister Koizumi stressed that Japan-North Korea normalization talks would not be concluded without full compliance with the Pyongyang Declaration between Japan and North Korea, in particular with regard to the security issues, including the nuclear issue, and abduction issues. President Bush reiterated his February statement in South Korea that the United States has no intention of invading North Korea as well as the fact that he had been prepared to pursue a bold approach to transforming U.S.-DPRK relations.

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e. IAEA Resolution

On November 29, 2002, the board of governors of the International Atomic Energy Agency ("IAEA") adopted a resolution deploring North Korea's position that it is entitled to possess nuclear weapons, available at *www.iaea.org/worldatom/Press/P_releasse/2002/med-advise_033.shtml.* The Department of State expressed its support for the IAEA action in a statement by Philip T. Reeker, deputy spokesman, set forth in full below.

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We welcome the strong resolution that the International Atomic Energy Agency (IAEA) Board of Governors adopted by consensus today regarding North Korea's nuclear program. The resolution deplores North Korea's repeated public statements that it is entitled to possess nuclear weapons, which is contrary to its obligations under the Nuclear Non-Proliferation Treaty. The Board insisted that North Korea urgently and constructively cooperate with the IAEA in opening immediately all relevant facilities to IAEA inspections and safeguards and urged North Korea to give up any nuclear weapons program, expeditiously and in a verifiable manner.

This resolution sends a clear, strong and unmistakable signal that the international community will not tolerate a North Korean nuclear weapons program. North Korea must come into compliance with its obligations under the Nuclear Non-Proliferation Treaty, including its safeguards agreement with the IAEA. Adoption of this resolution by the 35-member Board makes clear that North Korea's nuclear weapons ambitions and program are an issue between North Korea and the international community, not a bilateral issue with the United States, as the North Koreans have tried to portray it. (The text of the resolution is available at *www.iaea.org.*)

f. Shipment of Scud missiles to Yemen

On December 9, 2002, the Spanish navy boarded a merchant ship carrying the name *So San* in the Indian Ocean and dis-

covered fifteen Scud missiles hidden on board. The Spanish navy was participating in Operation Enduring Freedom, seeking to prevent the escape by sea of al Qaeda and Taliban forces. On December 11, the vessel was released and it proceeded to Yemen.

At the time of the boarding, the *So San* was flying no flag. The North Korean flag was painted out on the ship's funnel, as were the Korean characters for *So San*. The master indicated that the vessel was registered in Cambodia, carrying a cargo of cement for Socotra Island, Yemen. The Cambodian Government could only confirm that the ship met the description of a vessel registered in Cambodia under a different name. Under these circumstances, the Spanish navy had suspected that the vessel was without nationality.

In a press conference on December 11, 2002, White House Spokesman Ari Fleischer stated that the ship was boarded because it "was a non-flagged vessel" but had been permitted to proceed to Yemen because "[t]here is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea." Further, "[w]hile there is authority to stop and search, in this instance there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen and therefore the merchant vessel is being released." Mr. Fleischer indicated that the administration would be reviewing the possible need for strengthening non-proliferation controls to apply in such situations. Additional excerpts from the press conference are set forth below.

The full text of the press conference is available at *www.whitehouse.gov/news/releases/2002/12/20021211-5.html#2.*

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Q Can you tell us what the status is of the ship carrying the 15 Scud missiles that were headed for Yemen? And can you kind of walk us through this whole incident?

MR. FLEISCHER: Let me start on the walk-through, and then I'll give you the status. There are some developments. This has

been a very successful coalition interdiction effort that took place in the Arabian Sea. We became aware of the departure of a ship from North Korea that was carrying what we believed to be weapons of concern. This was a non-flagged vessel, which gave us further concern. And the vessel was destined for Yemen. We had a concern about what was on it. We had a concern before ascertaining, indeed, that it was going to Yemen that it may have been heading for a nation that was a terrorist—a potential terrorist nation.

As a result, the actions that were taken were the ship was stopped and boarded. And I can report to you now that the matter has been discussed with Yemeni officials. Secretary Powell has spoken with Yemeni authorities; the Vice President has done so, as well, and we have looked at this matter thoroughly. There is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea. While there is authority to stop and search, in this instance there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen. And therefore, the merchant vessel is being released.

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Q Didn't the United States have an agreement with Yemen that Yemen not purchase this type of equipment from North Korea?

MR. FLEISCHER: We have, as you know, efforts around the world on the proliferation front to discourage missile technologies, import, or export in most cases. And that is part of our ongoing dialogue with Yemen. It involves some issues that immediately enter the category of legality in terms of various agreements, international treaties and agreements and understandings between the United States and Yemen and around the world vis-a-vis the Missile Technology Control Regime. And so the conversations have been taking place with Yemen about it, but it's not possible to reach such a clear conclusion.

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Q But [has Yemen] given us assurances, verbal or written, that they would not buy any more missile technology from North Korea after the August embargo was slapped on the North Korean companies?

MR. FLEISCHER: Well, let me say this about the future, as well. Yemen is a partner of the United States in the war on terrorism. There are many agreements around the world in international treaty law which have been agreed to, focused on nuclear proliferation, on biological proliferation, on chemical weapon proliferation. One thing that does come out of this that the United States thinks needs to be looked at by the world is that there are less stringent agreements on the international treaty level dealing with proliferation of missiles.

The nuclear proliferation agreements are well-known. Biological and chemical are well-known. One thing that this does underscore is the need to take a look—and we will do so, with friends and others around the world—in a diplomatic sense about whether or not the international regimes that deal with missile proliferation need a second look.

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Q Are you contemplating more sanctions against North Korea for this?

MR. FLEISCHER: Again, under the Missile Technology Control Regime, there is no provision of international law that prohibited this.

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. . . [T]he large majority of the international community has long opposed proliferation of these type of missiles. The United States has identified North Korea as one of the prime exporters of such missiles, and North Korea actions, in the case of this interception, demonstrate clearly the concerns we have as a country. Having said that, international law still is international law, and you have to be careful to separate an agreement North Korea made with the United States and Japan and South Korea, vis-a-vis the agreed framework, and their cooperation with the agreed framework on the issue of oil, which you did raise, separate and apart from whether or not in this instance the export of the Scud missiles was not controlled by international law.

Q During the Cuban missile crisis there was not international law that guided missile exports between the Soviet Union, at

the time, and Cuba, and yet the United States turned the ships around.

MR. FLEISCHER: Well, this is why I suggest to you that—I said earlier that Yemen is a partner of the United States and that we had concerns about whether or not these missiles were going to head to any rogue regimes. And that would have been a different matter. But the fact of the matter is the import or export of this which is legal must be observed under international law. If international law would have given the United States the right to do other things vis-a-vis other nations, you can rest assured we would have exercised those rights.

The issue is whether the national security of the United States or our interests or friends in the region would have been affected had these missiles been intended for another nation.

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. . . [W]e have to be guided by the law in these matters. This is about our national security, and the law is a reflection of the protections that have been placed to defend our national security. And given the fact that it was—we had concerns about whether or not this would have raised national security issues; those concerns were explored, evaluated as a result of the international action. We had the actual information about what was on the ship and where it was going. It did not rise to that level and so, therefore, as the law would require, since there was no provision that prohibited them from accepting these missiles, the determination was made that the ship would proceed.

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Q . . . [Y]ou said that there was a basis, legal basis under international law to interdict the ship.

MR. FLEISCHER: Correct.

Q Can you just clarify what that was? Is that part of the missile—

MR. FLEISCHER: No, because the ship was an unflagged vessel, there was a right to stop and search the ship. . . . It's under maritime law.

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The issue again . . . , is we as the United States—as much as we do not like what North Korea does around the world, the United States still has an obligation to follow international law, and not let the fact that we believe that North Korea is a proliferator and presents dangerous problems to the United States in other regards from telling us that we have a right to violate international law. We do not. And we still have to obey international law so that we are in a stronger position to enforce international law on nations like North Korea.

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Q [T]o what extent does this go against everything that this administration has been preaching about weapons spread to anywhere?
MR. FLEISCHER: You know, one of the ways that the world fights proliferation is through international treaties. And in order to adhere to treaties, all nations must adhere to the law. And we have an obligation to adhere to the international law in this case. I think the United States would be on thin ground if we, out of convenience or out of any other reason said, we will violate international law because we have other concerns. We cannot do that. The fact that we will adhere to international law, in the end, helps strengthen international agreements that fight proliferation efforts like this. And as we freely admit, this incident exposes flaws in international regimes and international laws that are worthy of having a renewed look by the world about these efforts.

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MR. FLEISCHER: Again, we have no choice but to obey international law. And what Yemen has done in this case, because Yemen is an ally of the United States, in that sense it does not provide a threat to the United States. In terms of North Korea, we do have ongoing concerns about North Korea's efforts to be—to sell arms around the world, and those concerns are well known.

4. U.S.-IAEA Additional Protocol

In recent years, efforts have been made to strengthen the IAEA's safeguards system. These efforts include a

reaffirmation of the IAEA's right to conduct special inspections and the use of new tools for the detection of clandestine nuclear facilities. In 1997, the IAEA adopted a "model protocol" for existing safeguards agreements under the NPT that is designed to give the IAEA a stronger role and more effective tools for conducting worldwide inspections. It provides for additional declarations about states' nuclear-related activities and expands IAEA access rights. On May 9, 2002, President George W. Bush transmitted the U.S.-IAEA Additional Protocol to the U.S.-IAEA Safeguards Agreement, S. Treaty Doc. No. 107–7 (2002) to the Senate for advice and consent to ratification. Excerpts from the President's transmittal letter and from the Secretary of State's letter submitting the treaty to the President are provided below.

LETTER OF TRANSMITTAL

The White House, May 9, 2002.

To the Senate of the United States:

I submit herewith, for Senate advice and consent to ratification, the Protocol Additional to the Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America, with annexes, signed at Vienna June 12, 1998 (the "Additional Protocol"). Adhering to the Additional Protocol will bolster U.S. efforts to strengthen nuclear safeguards and promote the nonproliferation of nuclear weapons, which is a cornerstone of U.S. foreign and national security policy.

At the end of the Persian Gulf War, the world learned the extent of Iraq's clandestine pursuit of an advanced program to develop nuclear weapons. In order to increase the capability of the International Atomic Energy Agency (the "Agency") to detect such programs, the international community negotiated a Model Additional Protocol (the "Model Protocol") to strengthen the Agency's nuclear safeguards system. The Model Protocol is to be used to amend the existing bilateral safeguards agreements of states with the Agency.

The Model Protocol is a milestone in U.S. efforts to strengthen the safeguards system of the Agency and thereby to reduce the

threat posed by clandestine efforts to develop a nuclear weapon capability. By accepting the Model Protocol, states assume new obligations that will provide far greater transparency for their nuclear activities. Specifically, the Model Protocol strengthens safeguards by requiring states to provide broader declarations to the Agency about their nuclear programs and nuclear-related activities and by expanding the access rights of the Agency.

The United States signed the Additional Protocol at Vienna on June 12, 1998. The Additional Protocol is a bilateral treaty that would supplement and amend the Agency verification arrangements under the existing Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America of November 18, 1977 (the "Voluntary Offer"), which entered into force on December 9, 1980. The Additional Protocol will enter into force when the United States notifies the Agency that the U.S. statutory and constitutional requirements for entry into force have been met.

The Treaty on the Non-Proliferation of Nuclear Weapons (the "NPT") requires non-nuclear-weapon states parties to accept Agency safeguards on their nuclear activities. The United States, as a nuclear-weapon state party to the NPT, is not obligated to accept Agency safeguards on its nuclear activities. Nonetheless, it has been the announced policy of the United States since 1967 to permit the application of Agency safeguards to its nuclear facilities —excluding only those of direct national security significance. The Additional Protocol similarly allows the United States to exclude its application in instances where the United States decides that its application would result in access by the Agency to activities with direct national security significance to the United States or access to locations or information associated with such activities. I am, therefore, confident that the Additional Protocol, given our right to invoke the national security exclusion and to manage access in accordance with established principles for implementing these provisions, can be implemented in a fashion that is fully consistent with U.S. national security.

By submitting itself to the same safeguards on all of its civil nuclear activities that non-nuclear-weapon states parties to the NPT are subject to, the United States intends to demonstrate that

adherence to the Model Protocol does not place other countries at a commercial disadvantage. The U.S. signature of the Additional Protocol was an important factor in the decisions of many non-nuclear-weapon states to accept the Model Protocol and provided significant impetus toward their early acceptance. I am satisfied that the provisions of the Additional Protocol, given our right to manage access in accordance with Article 7 and established implementation principles, will allow the United States to prevent the dissemination of proliferation-sensitive information and protect proprietary or commercially sensitive information.

I also transmit, for the information of the Senate, the report of the Department of State concerning the Additional Protocol, including an article-by-article analysis, a subsidiary arrangement, and a letter the United States has sent to the Agency concerning the Additional Protocol. Additionally, the recommended legislation necessary to implement the Additional Protocol will be submitted separately to the Congress.

I believe that the Additional Protocol is in the best interests of the United States. Our acceptance of this agreement will sustain our longstanding record of voluntary acceptance of nuclear safeguards and greatly strengthen our ability to promote universal adoption of the Model Protocol, a central goal of my nuclear non-proliferation policy. Widespread acceptance of the Protocol will contribute significantly to our nonproliferation objectives as well as strengthen U.S., allied, and international security. I, therefore, urge the Senate to give early and favorable consideration to the Additional Protocol, and to give advice and consent to its ratification.

George W. Bush.

LETTER OF SUBMITTAL

The Secretary of State,
Washington, April 30, 2002.

The President:

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The Model Protocol requires states to report a range of information to the Agency about their nuclear and nuclear-related

activities and about the planned developments in their nuclear fuel cycles. This includes expanded information about their holdings of uranium and thorium ores and ore concentrates and of other plutonium and uranium materials not currently subject to Agency safeguards, general information about their manufacturing of equipment for enriching uranium or producing plutonium, general information about their nuclear fuel cycle-related research and development activities not involving nuclear material, and their import and export of nuclear material and equipment.

Such broad-based information makes it substantially more difficult for a state planning a nuclear-weapon program to conceal the early stages of that program and provides the Agency with a critical reference base for comparison with information otherwise available to it, including information from other states. The Model Protocol also provides the Agency with certain rights of access to declared locations as well as to other locations to investigate the possibility of undeclared activities. This increased risk of early detection is intended to deter non-nuclear-weapon states that might, in the future, be tempted to undertake a clandestine nuclear weapon program.

With increased transparency of non-nuclear-weapon states' nuclear programs, the Agency should be able to provide greater assurance of both the absence of diversion of declared nuclear material and the absence of undeclared nuclear material and activities in non-nuclear-weapon states.

Minimizing the burden of safeguards on inspected locations is a long-standing concern of the Agency and its member states and is reflected in a number of provisions of existing safeguards agreements, including the Voluntary Offer, and in the Model Protocol. Existing Agency safeguards agreements specify that safeguards shall be implemented in a manner designed to avoid hampering economic and technological development and to avoid undue interference in peaceful nuclear activities, that the Agency shall take every precaution to protect commercial and industrial secrets and other confidential information coming to its knowledge, and that the Agency shall require only the minimum amount of information and data consistent with carrying out its responsibilities. These provisions of existing safeguards agreements remain in force and are expanded by the Model Protocol.

The overall design of the Model Protocol was shaped by the interest of states in establishing an appropriate balance between improving the effectiveness of the safeguards system and the need to avoid undue interference with legitimate nuclear or nuclear-related activities. The declaration requirements of the Model Protocol are of a general character.

The Agency is precluded from mechanistically or systematically verifying the declarations. The Model Protocol defines the activities the Agency may carry out at locations of different types; provides for managed access to protect various classes of sensitive information; and provides for the negotiation of subsidiary arrangements as needed to further define how Protocol measures shall be applied, including at particular locations. The Model Protocol requires the Agency to maintain a stringent regime to ensure effective protection against disclosure of confidential information.

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Respectfully submitted,

Colin L. Powell.

5. International Code of Conduct against Ballistic Missile Proliferation ("ICOC")

On November 25, 2002, the United States became an initial Subscribing State to the International Code of Conduct against Ballistic Missile Proliferation ("ICOC") in The Hague, The Netherlands. Remarks by Under Secretary of State for Arms Control and International Security John R. Bolton provide the views of the United States on the ICOC itself and its role in conjunction with other non-proliferation instruments. The text of the ICOC is available at *www.defense-aerospace.com/data/verbatim/data/ve308/*.

Under Secretary Bolton's remarks are available at *www.state.gov/t/us/rm/15488pf.htm*.

I am honored to represent the United States of America as an initial Subscribing State to the International Code of Conduct

against Ballistic Missile Proliferation (ICOC). The entry into effect today of the ICOC marks an important contribution to the international effort against the proliferation of ballistic missiles capable of delivering weapons of mass destruction (WMD)—an effort that the United States has always strongly supported.

The large number of countries that have subscribed to the ICOC and are represented here is a concrete demonstration that the international community has recognized and is looking for additional ways to address the proliferation of the most threatening means of delivery for weapons of mass destruction. It is no accident that the dangerous proliferation of ballistic missiles occurs predominantly in parallel with programs for nuclear, chemical, and biological weapons. International concern about such ballistic missile programs is heightened by the fact that weapons of mass destruction programs also often exist in parallel with support for terrorist groups. Viewed in this context, it is clear why the proliferation of ballistic missiles threatens international peace and security on a worldwide basis.

The United States regards the proliferation of ballistic missiles capable of delivering WMD as a direct threat to the U.S., our deployed forces, our friends and allies, and our interests in key regions of the world.

The United States sees the International Code of Conduct against Ballistic Missile Proliferation as an important addition to the wide range of tools available to countries to impede and roll back this proliferation threat. One element of our strategy is multilateral efforts against missile proliferation, such as the ICOC and the Missile Technology Control Regime (MTCR). Another important element is missile defense. We view our missile defense efforts as complementary to, and consistent with the objectives of, the ICOC and the MTCR. Each seeks in different ways to protect us from the dangers posed by WMD and ballistic missile proliferation. We are now in the process of discussing with allies and friends, including the Russian Federation, cooperation on missile defense programs because our nation is hardly alone in needing the additional protection that such programs can provide. Missile defenses, the MTCR, and the ICOC play important roles in deterring and reducing missile proliferation, and the United

States will be ready to work with members of the ICOC, and of the MTCR, to ensure that these complementary efforts are mutually reinforcing.

While an important new addition to the broad arsenal of nonproliferation measures, it is no secret that the ICOC has its limitations. For example, in taking on the political commitment pursuant to the ICOC to "exercise maximum possible restraint in the development, testing and deployment of Ballistic Missiles capable of delivering weapon of mass destruction," the United States—like other countries—understands this commitment as not limiting our right to take steps in these areas necessary to meet our national security requirements consistent with U.S. national security strategy. This includes our ability to maintain our deterrent umbrella for our friends and allies, and the capabilities necessary to defeat aggression involving WMD attacks. But all Subscribing States will have the opportunity to discuss these issues in detail, and to participate in consensus decisions to evolve the text.

Most of this implementation work will concern the ICOC's requirements for pre-launch notification of Subscribing States' ballistic missile and space-launch vehicle launches and test flights. The United States intends to make pre-launch notifications and annual declarations pursuant to the ICOC based upon current U.S. proposals in its negotiations with the Russian Federation on a Pre-Launch Notification System, including on the question of which launches are to be notified. For example, the United States reserves the right in circumstances of war to launch ballistic missiles and space-launch vehicles without prior notification.

Once implementation is completed, the notifications and annual declarations that the United States provides pursuant to the ICOC will be based upon the U.S.-Russian Pre-Launch Notification System, to be established in connection with the U.S.-Russian Joint Data Exchange Center. Over the longer term, we agree with the Russian Federation that the bilateral U.S.-Russian system should be multilateralized. We hope, in turn, that such a multilateralized system might provide the mechanism by which all ICOC Subscribing States exchange pre-launch notifications. We plan to keep all Subscribing States informed on the progress of the implementation of the U.S.-Russia agreement on launch notification, and on

the implications and opportunities that a multilateralized U.S.-Russia Pre-Launch Notification System can present for the ICOC.

Some have been concerned that the ICOC is simply a political declaration and not "legally binding." But surely the real issue is not the nature of the commitment, but the extent of the political will to comply with the Code that signatories demonstrate. Too often in the arms control and nonproliferation fields, countries make a great public flourish about adhering to codes and conventions, and then, quietly and deceptively, do precisely the opposite in private.

In the context of the Biological Weapons Convention (BWC), for example, we know that several member states are violating their commitments to the treaty. To expose some of these violators to the international community, we have named publicly states the U.S. Government knows to be pursuing the production of biological warfare agents in violation of the BWC—including Iraq, North Korea, Iran and Libya, as well as Cuba, which we believe has at least a limited, developmental offensive biological warfare R&D effort, and which has provided dual-use biotechnology to other rogue states.

Even as we speak, we face a grave threat to the integrity of the Non-Proliferation Treaty. North Korea brazenly admitted last month to having a program to enrich uranium for nuclear weapons. This egregious violation of its treaty commitments threatens the security of all nations, as well as the continued credibility of the Non-Proliferation Treaty.

Surely, none of us wants this disdain and disregard to happen to the new ICOC. That is why we are not concerned about the states that have chosen not to subscribe to the Code. Far better to know who is actually prepared to live under its terms, and who is not. Far better to know who is truly serious about stopping the proliferation of ballistic missile technology and the risk that such technology could be used to carry weapons of mass destruction against innocent civilian populations.

In conclusion, Mr. Chairman, the United States places great value on the International Code of Conduct against Ballistic Missile Proliferation and has high confidence in its future potential. We pledge our full support to you and our fellow Subscribing States in the demanding tasks ahead. Thank you.

6. Nonproliferation Sanctions Imposed by the United States

a. Missile proliferation

On August 16, 2002, the United States imposed missile proliferation sanctions against a North Korean manufacturer, Changgwang Sinyong Corp. and its sub-units and succcessors, for engaging in missile technology proliferation activities. 67 Fed. Reg. 54,693 (Aug. 23, 2002).

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. . . 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 August 16, 2002 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) 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 this person: Changgwang Sinyong Corporation (North Korea) and its sub-units and successors.

Accordingly, the following sanctions are being imposed on this person:

(A) New individual licenses for exports to the person 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 person described above of MTCR Annex-controlled 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-controlled equipment or technology involving the person described above will be entered into for two years.

With respect to items controlled pursuant to the Export Administration Act of 1979, the export sanctions only apply to exports made pursuant to individual export licenses.

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 MTCR Annex-controlled 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 relating to MTCR Annex-controlled equipment or technology involving the government activities described above will be entered into for two years.

These measures shall be implemented by the responsible departments and agencies of the United States Government as provided in Executive Order 12851 of June 11, 1993.

b. Iran Nonproliferation Act of 2000

(1) Chinese entities

On January 16, 2002, the United States imposed penalties on two Chinese companies and one Chinese national pursuant to the Iran Nonproliferation Act of 2000, Pub. L. No. 106–178, 114 Stat. 38. 67 Fed. Reg. 3528 (Jan. 24, 2002).

The sanctions were imposed against Liyang Chemical Equipment, China Machinery and Electric Import and Export Company, and Q.C. Chen. A statement from the office of the Department of State press spokesman on January 24, 2002, explained that the sanctions were imposed for the transfer to Iran since January 1, 1999, of sensitive equipment and technology controlled by the Australia Group ("AG"), a 33-nation nonproliferation regime that seeks to prevent the proliferation of chemical and biological weapons. The spokesman also commented:

> Q.C. Chen is already subject to U.S. sanctions. In May 1997, he was among seven Chinese entities sanctioned, pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, for knowingly and materially assisting Iran's chemical weapons program through the transfer of chemical weapons precursor chemicals and/or chemical weapons-related production equipment and technology. These sanctions currently remain in place.
>
> For many years we have made known to the Chinese Government our concerns about specific Chinese entities providing assistance to Iran's chemical weapons program. Q.C. Chen has been among the entities we have raised on multiple occasions. China was informed in advance through diplomatic channels of our recent sanctions decision; we are not in a position to discuss the details of our contacts on this issue.

Excerpts below from the Federal Register notice enumerate the sanctions imposed against the entities and any successor, sub-unit, or subsidiary thereof. Comments by the Department of State press spokesman are available at *www.state.gov/r/pa/prs/ps/2002/7485.htm*.

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. . . . [P]ursuant to the provisions of the Act, the following measures are imposed on 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.

These measures shall be implemented by the responsible departments and agencies of the United States Government and will remain in place for two years, except to the extent that the Secretary of State or Deputy Secretary of State may subsequently determine otherwise. A new determination will be made in the event that circumstances change in such a manner as to warrant a change in the duration of sanctions.

(2) Armenian, Chinese, and Moldovan entities

On May 16, 2002, the United States imposed the same nonproliferation measures against two Armenian, eight Chinese, and two Moldovan entities, and any successor, sub-unit or subsidiary thereof, including a ban on U.S. government procurement, pursuant to sections 2 and 3 of the Iran Nonprolieration Act of 2000, Pub. L. No. 106–178. 67 Fed. Reg. 34,983 (May 16, 2002).

c. Iran-Iraq Arms Non-Proliferation Act of 1992 and chemical/biological nonproliferation provisions of the Arms Export Control Act and the Export Administration Act of 1979

On July 9, 2002, John Bolton, Under Secretary of State for Arms Control and International Security Affairs, by delegation of authority, determined that ten entities in the People's Republic of China and in India were engaged in proliferation activities that required the imposition of measures pursuant to the provisions of the Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102–484. 67 Fed Reg. 48,696 (July 25, 2002). The sanctions imposed against these entities and any successor entities, parents, or subsidiaries "to remain in place for two years, except to the extent subsequently determined otherwise" were set forth in the Federal Register notice, as follows:

> 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 person;
> 2. For a period of two years, the United States Government shall not issue any license for any export by or to the sanctioned person.

The Under Secretary also determined that eight of the Chinese entities against which sanctions had been imposed under the Iran-Iraq Nonproliferation Act, had engaged in chemical weapons proliferation activities that required the imposition of measures pursuant to the provisions of section 81(a) of the Arms Export Control Act (22 U.S.C. § 2798) and section 11C(a) of the Export Administration Act of 1979 (50 U.S.C. app § 2410c (as continued by E.O. 13222 of August 17, 2001). 67 Fed. Reg. 48,696 (July 25, 2002). The following measures were imposed against these entities and their successors, to "remain in place for at least one year until further notice:"

1. The United States Government shall not procure, or enter into any contract for the procurement of, any goods or services from the sanctioned persons;
2. The importation into the United States of products produced by the sanctioned persons shall be prohibited.

7. 2005 Non-Proliferation Treaty Review Conference

Ambassador Norman A. Wulf, representative of the United States to the first meeting of the preparatory committee for the 2005 NPT Review Conference, addressed the committee on April 8 and 17, 2002. Excerpts below from his intervention of April 17 address the particular challenge of promoting the safety and security of peaceful nuclear programs.

The full text of Ambassador Wulf's remarks is available at *www.state.gov/t/np/rls/rm/9926pf.htm*. His preliminary remarks to the first meeting, April 8, 2002, are available at *www.state.gov/t/np/rls/rm/9919pf.htm*.

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It is widely recognized that the NPT rests on three pillars: nuclear nonproliferation, the pursuit of disarmament, and the right of all responsible Parties to the Treaty to benefit from the peaceful uses of nuclear energy. This third pillar promises that the populations of states parties can share in nuclear energy's many benefits, ranging from medical, agricultural and environmental to energy-production. This right comes with an obligation to abide by and support the nonproliferation articles of the Treaty. In order to sustain peaceful nuclear cooperation, each state party must ensure the safety and security of the nuclear facilities and materials it uses for peaceful purposes.

* * * *

First and foremost, there must be full compliance with the letter and spirit of Articles I and II of the NPT. Ineffective controls

over nuclear-related exports might help terrorist groups acquire the components of a nuclear explosive or dispersal device. Irresponsible governments have found loopholes in these controls; there is no reason to believe terrorists could not do the same.

Second, the IAEA safeguards required under Article III of the NPT must provide strong verification of non-nuclear weapon states' nonproliferation undertakings. Because they help protect against the diversion of nuclear materials, safeguards remain the critical first line of defense against nuclear terrorism. A strong safeguards system and an IAEA with sufficient resources to implement it are the first barrier to terrorist exploitation of these materials. Fundamental to safeguards and their ability to protect against both proliferation and nuclear terrorism are the accuracy and integrity of state systems of accounting and control.

Third, all states must ensure effective physical protection for their nuclear facilities and materials. All states must address potential threats to these facilities and materials, particularly the threats of seizure of nuclear material and sabotage. They must be attentive to physical protection in all its aspects ranging from the legal and regulatory to the facility level. One fundamental step we can all take now to strengthen physical protection is to support the revision of the Convention on the Physical Protection of Nuclear Materials on the basis of the May 2001 Expert Meeting recommendation.

Finally, we need to secure our borders against illicit trafficking in both nuclear materials and radiological sources. Within our borders, we must focus on the safety and security of radiological sources, particularly high-activity and highly dispersible sources. These sources must be kept under control, and in cases where control has been lost we must seek to recover and secure them.

Each of us bears primary responsibility for the safety and security of our peaceful nuclear programs. But this is not a responsibility we need to bear alone. The NPT urges states to cooperate in peaceful nuclear endeavors, whether bilaterally, in conjunction with groups of states, or through international organizations. In the face of the enhanced threat of nuclear terrorism, existing cooperation should be further expanded. We

should take advantage of the benefits—developmental, economic, educational—that cooperation in safety and security offers.

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Cross References

International Criminal Court, **Chapter 3.C.2.**
Litigation concerning termination of ABM treaty, **Chapter 4.B.6.a.**
Claims by American prisoners of war under California law, **Chapter 8.B.4.a.(1)**
Role of international law in resolving conflict and controlling violence, **Chapter 17.A.**
Optional Protocol on Involvement of Children in Armed Conflict, **Chapter 6.C.2.a.**

Table of Cases

* *An asterisk denotes cases in courts and fora, including the International Court of Justice, other than U.S. federal and state courts.*

A

AAR Internat'l, Inc. *v.* Nimelias Enters. S.A. (2001), 860, 861
Aaran Money Wire Service, Inc. *v.* United States (2002), 101
Abdulaziz *v.* Metropolitan Dade County (1984), 553, 561
Abdullahi *v.* Pfizer, Inc. (2002), 345–346
*ADF Group Inc. *v.* United States, 641–661
Adams *v.* Vance (1978), 590
Advanced Micro Devices *v.* Intel Corporation (2002), 875–876
Aguinda *v.* Texaco, Inc. (2002), 355–357
*Ahani *v.* Canada (2002), 267*n*
Ahmed *v.* Hoque (2002), 552–567
Aidi *v.* Yaron (1987), 551*n,* 563
*Al-Adsani *v.* The United Kingdom (2001), 474
Alaska *v.* United States of America, 738–756
Al Odah *v.* United States (2002), 980–986
Aldrich *v.* Mitsui & Co. (1988), 437*n*
Alexander *v.* Sandoval (2001), 223
Alfred Dunhill of London, Inc. *v.* Cuba (1976), 466, 504–505, 509, 510
Allen-Bradley Local No. 1111 *v.* Wisconsin Employment Relations Bd. (1942), 443
Allendale Mut. Ins. Co. *v.* Bull Data Sys., Inc. (1993), 866*n*
Alliance of Descendants of Texas Land Grants *v.* United States (1994), 511
Allstate Ins. Co. *v.* Hague (1981), 454, 456
Altmann *v.* Republic of Austria (2002), 507, 508, 509
Altmann *v.* Republic of Austria (2001), 514
Alvarez-Machain *v.* United States (1992), 77–78
Alvarez-Machain *v.* United States (1996), 335
Alvarez-Machain *v.* United States (2002), 346
Alvarez-Machain *v.* United States of America (2001), 346

American Inst. in Taiwan *v.* United States ex rel. Wood (2002), 245–246, 538
American Insurance Association *v.* Low (2002), 415–429
Amlon Metals, Inc. *v.* FMC Corp. (1991), 335, 336
Anderson *v.* Watt (1891), 489
Aptheker *v.* Sec'y of State (1964), 14
Arbelo, United States *v.* (2002), 8
Arcaya *v.* Paez (1956), 553, 560
Arce Gonzalez *v.* Gutierrez (2002), 54–56
Argentine Republic *v.* Amerada Hess Shipping Corp. (1989), 218, 222, 465, 467, 469, 473, 578
*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo *v.* Belgium) (2002), 474
Asakura *v.* Seattle (1924), 223
Attorney General of Canada *v.* R.J. Reynolds Tobacco Holdings, Inc. (2002), 837–841
Attorney General of Canada *v.* RJ Reynolds Tobacco Holdings, Inc. (2000), 838

B

Bailey *v.* United States (1995), 484
Baiz, *In re* (1890), 553
Baker *v.* Carr (1962), 200–201, 340, 341, 342, 343, 475
*Bamaca Valasquez Case (2000), 1014
Banco Nacional de Cuba *v.* Sabbatino (1964), 342, 442, 475, 493, 574
Banyan Licensing *v.* Orthosupport International (2002), 864
Barclays Bank PLC *v.* Franchise Tax Board (1994), 453
Beacon Products Corp. *v.* Reagan (1986), 202
Beanal *v.* Freeport-McMoran, Inc. (1999), 335, 336
Belmont, United States *v.* (1937), 442
Berdakin *v.* Consulado de la Republica de El Sal. (1995), 540
Berman *v.* Schweiker (1983), 588
Bernstein *v.* N.V. Nederlandsche-Amerikaansche (1954), 508
Bestfoods, United States *v.* (1998), 483
Bigio *v.* Coca-Cola Co. (2000), 334
Birch Shipping Corp. *v.* Embassy of the United Republic of Tanz. (1980), 541
Bird *v.* United States (1996), 985
Bivens *v.* Six Unknown Named Agents of Federal Bureau of Narcotics (1971), 233–234
Block *v.* North Dakota (1983), 588
BMW of N. America, Inc. *v.* Gore (1996), 421, 424, 453
Boimah *v.* United Nations Gen. Assembly (1987), 571

Boos *v.* Barry (1988), 561, 566
Boshnjaku *v.* Federal Republic of Yugoslavia (2002), 466–467, 491–492
Boyle *v.* United Technologies Corp. (1988), 443
BP Chems. Ltd. *v.* Jiangsu Sopo Corp. (2002), 517–518
Braunfeld *v.* Brown (1961), 15
Breard *v.* Greene (1998), 47
*Briggs *v.* Baptiste (1999), 267*n*
Brown *v.* Gardner (1994), 484
Bryks *v.* Canadian Broad. Corp. (1995), 477
Buong Van Ho *v.* United States (2002), 413
Burnet *v.* Clark (1932), 483
Byrd *v.* Corporacion Forestal y Industrial de Olancho S.A. (1999), 472

C
*Caballero Delgado and Santana Case (1995), 268*n*
Cabello Barrueto *v.* Fernández Larios (2002), 351, 474
California, United States *v.* (1947), 248, 255
Campbell *v.* Clinton (2000), 199
Canadian Transport Co. *v.* United States (1980), 218
Carl Marks & Co., Inc. *v.* Union of Soviet Socialist Republics (1988), 498, 504, 505, 506–507, 509, 513, 514
Carrera *v.* Carrera (1959), 553
Carter *v.* United States (2000), 526–527
Casanova *v.* Fitzpatrick, United States *ex rel* (1963), 554
Cedric Kushner Promotions, Ltd. *v.* King (2001), 482
Chan *v.* Korean Air Lines, Inc. (1989), 436, 440
Chase Manhattan Bank *v.* Traffic Stream (BVI) Infrastructure Ltd. (2000), 228
Chenoweth *v.* Clinton (1999), 199
Chicago & Southern Air Lines, Inc. *v.* Waterman S.S. Corp. (1948), 200, 589
China Oil and Gas Pipeline Bureau, *In re* (2002), 516–517
China Trade & Dev. Corp. *v.* M.V. Choong Yong (1987), 866*n*
Christopher *v.* Harbury (2002), 231–236
Chuidian *v.* Philippine National Bank (1990), 467, 472, 473, 477
Chy Lung *v.* Freeman (1875), 427, 428, 447
Cicippio *v.* Islamic Republic of Iran (1994), 503
Cicippio *v.* Islamic Republic of Iran (1998), 534
City of Englewood *v.* Socialist People's Libyan Arab Jamahiriya (1985), 542, 579
Coalition of Clergy *v.* Bush (2002), 981
*Coard et al. *v.* United States (1999), 1016–1017
Coleman *v.* Miller, 201

Colorado River Water Conserv. Dist. *v.* United States (1976), 860, 861
Comm. of U.S. Citizens Living in Nicaragua *v.* Reagan (1988), 216
Commonwealth of the Northern Mariana Islands *v.* United States (2002), 246–259
Compagnie des Bauxites de Guinea *v.* Insurance Co. of North America (1981), 866
Conolly *v.* Taylor (1829), 489
Container Corp. *v.* Franchise Tax Board (1983), 454
Coplon, United States *v.* (1949), 553
Correctional Servs. Corp. *v.* Malesko (2001), 223, 234
County of Arlington, United States of America *v.* (1983), 580
County Sovereignty Comm. *v.* Dep't of State (2002), 91
Credit Suisse *v.* United States District Court for the Central District of California, 342
Creppel *v.* United States (1994), 511
Croesus EMTR Master Fund L.P. *v.* The Federative Republic of Brazil (2002), 519
Croll *v.* Croll (2000), 56
Cronin *v.* Islamic Republic of Iran (2002), 529–534
Crosby *v.* Nat'l Foreign Trade Council (2000), 200, 428, 444, 446, 447, 449, 451
Cruz *v.* United States (2002), 212–218, 498, 500, 511–513
*Cruz Varas and Others, In the Case of (1991), 267*n*
Cuban American Bar Ass'n, Inc. *v.* Christopher (1995), 985
Cummings, United States *v.* (2002), 57–58
Curtiss-Wright Export Corp., United States *v.* (1936), 442
Custer County Action Association *v.* Garvey (2001), 340
*Cyprus *v.* Turkey (1976), 1015

D

Daliberti *v.* Republic of Iran (2001), 534
Dames & Moore *v.* Regan (1981), 214*n,* 414, 426, 545
De La Pava, United States *v.* (2001), 215
De Luca *v.* United Nations Organization (1994), 571, 572
Demjanjuk, United States *v.* (2002), 5–8
Department of Air Force *v.* Rose (1976), 234
Department of the Navy *v.* Egan (1988), 589
Dexter & Carpenter, Inc. *v.* Kunglig Jarnvagsstyrelsen (1930), 561
Diggs *v.* Richardson (1976), 215
Dillman *v.* Mitsubishi Material Corp., 438
Doe I *v.* Unocal Corp. (2000), 338, 343–344
Doe I *v.* Unocal Corp. 2002 (2002), 344
Doe I *v.* Unocal Corp. 2003 (2003), 344
Doe *v.* Exxon Mobil, 357–363, 575

Doe *v.* Liu Qi (2002), 469–476, 575
Dole Food Company *v.* Patrickson (2003), 480–491
Dole *v.* United Steelworkers of Am. (1990), 424
Dorothy McCarthy, In the Matter of the Claim of (1971), 241*n*
Dow Jones *v.* Harrods (2002), 868–871
Duncan *v.* Kahanamoku (1946), 990
Dupont Circle Citizens Ass'n *v.* District of Columbia Bd. of Zoning Adjustment (1987), 538

E
EAL Corp. *v.* European Organization for the Safety of Air Navigation (1994), 469
Edgar *v.* MITE Corp. (1982), 453
EEOC *v.* Arabian Am. Oil Co. (1991), 422
Eisentrager *v.* Forrestal (1949), 982
El Fadl *v.* Central Bank of Jordan (1996), 472
Enger, United States *v.* (1978), 553
Estate of Marcos *v.* Hilao (1995), 324, 336
Eunique *v.* Powell (2002), 13–15

F
Fallini *v.* United States (1995), 511
FDIC *v.* Mallen (1988), 98
Federal Deposit Insurance Corp. *v.* Meyer (1994), 564
Feng Suo Zhou *v.* Li Peng (2000), 581–585
Ferreiro *v.* United States (2002), 236–242
Filartiga *v.* Pena-Irala (1980), 323, 328–329, 334, 336, 340, 474, 563
Filtech S.A. *v.* France Telecom S.A. (2002), 517
Filus *v.* LOT Polish Airlines (1993), 516
Fireman's Ins. Co. *v.* Onwualia (1994), 560
First Am. Corp. *v.* Sheikh Zayed Bin Sultan Al-Nahyan (1996), 548, 549*n*
First English Evangelical Lutheran Church *v.* Los Angeles County (1987), 224*n*
First Nat'l City Bank *v.* Banco Para El Comercio Exterior De Cuba (1983), 483, 512, 546
*Fisheries Case (United Kingdom *v.* Norway, 1951), 751–752
Flatow *v.* Islamic Republic of Iran (1998) (2002), 545–547
Flatow *v.* Islamic Republic of Iran (1999), 542
Flores *v.* Southern Peru Copper Corp. (2002), 344–345
Flynn *v.* Shultz (1984), 589
Ford *v.* Garcia (2002), 348–351
Foster *v.* Neilson (1829), 221

Freeport-McMoRan Inc. *v.* K N Energy, Inc. (1991), 489
Fujitsu Ltd. *v.* Federal Express Corp. (2001), 437*n*

G
Garb *v.* Republic of Poland (2002), 492–494, 497, 509, 513–516
Garcia, United States *ex rel.* Saroop *v.* (1997), 215–216
Gardiner Stone Hunter International *v.* Iberia Lineas Aereas de Espana (1995), 469
Gau Shan Co. *v.* Bankers Trust Co. (1992), 866*n,* 867
General Electric *v.* Deutz AG (2001), 866*n,* 867
*Genie Lacayo Case (1997), 268*n*
Gerling Global Reinsurance Corp. of America *v.* Gallagher (2001), 417, 421, 425, 451–452n, 454, 456n
Gerling Global Reinsurance Corp. of America *v.* Low (2002), 416
Gerritsen *v.* Escobar & Cordova (1988), 562
Gerritsen *v.* Hurtado (1987), 540
Gilbert *v.* Homar (1997), 98
Glencore Grain Rotterdam B.V. *v.* Shivnath Rai Harnarain Company (2002), 874
Global Relief Foundation, Inc. *v.* O'Neill (2002), 94–98
Global Services International, Inc. *v.* United States (2002), 101
Goldstar (Panama) S.A. *v.* United States (1992), 215, 216, 992
Goldwater *v.* Carter, 199, 201–202
Gorshkow, United States *v.* (2002), 5–6
Gray *v.* Permanent Mission of People's Republic of Congo to the U.N. (1978), 540
Greenspan *v.* Crosbie (1976), 552*n*
Guaranty Trust Co. of New York *v.* United States (1938), 497, 507
Guinto *v.* Marcos (1986), 336

H
Habib *v.* Bush (2002), 981
Haig *v.* Agee (1981), 14, 100, 200, 589
Hair *v.* United States (2002), 460–461
Hallowell *v.* Commons (1916), 514
Hallstrom *v.* Tillamook County (1989), 482
Hamdi *v.* Rumsfeld (2002), 986–997
Harisiades *v.* Shaughnessy (1952), 200, 590, 595
Harlow *v.* Fitzgerald (1982), 234
Head Money Cases (1884), 215
Healy *v.* Beer Inst. (1989), 421, 422, 423, 453, 455
Hellenic Lines, Ltd. *v.* Moore (1965), 551
Herbage *v.* Meese (1990), 469
Higgins *v.* Islamic Republic of Iran (2000), 534

Hilao *v.* Estate of Marcos (1996), 474
Hillsborough County *v.* Automated Medical Laboratories, Inc. (1985), 443
Hines *v.* Davidowitz (1941), 426, 442–443, 444, 446, 447
Holmes *v.* Laird (1972), 201
Holy Land Foundation for Relief and Development *v.* Ashcroft (2002), 98–101
Home Ins. Co. *v.* Dick (1930), 422, 423, 454, 455
Hopland Band of Pomo Indians *v.* United States (1988), 510–511
Hue Thi Nguyen *v.* United States (2002), 413–415
Hughes Aircraft *v.* United States (1997), 496, 497, 499, 501, 506, 507
Hughes *v.* Ashcroft (2001), 8
Humanitarian Law Project *v.* Reno (2000), 93–94
Hwang Gum Joo *v.* Japan (2001), 494–503

I

Imbler *v.* Pachtman (1976), 564
Immigration and Naturalization Service *v.* St. Cyr (2001), 496, 497, 499, 500, 501, 506
In re _____. *See name of party*
INS *v.* Chadha (1983), 590
*Ireland *v.* United Kingdom (1978), 370*n*
Irwin *v.* Department of Veterans Affairs (1990), 588
Isbrandtsen Tankers, Inc. *v.* President of India (1971), 510
Islamic Republic of Iran *v.* Boeing (1985), 216*n*
Islamic Republic of Iran *v.* McKesson HBOC, Inc. (2001) (2002), 219–226, 502–503, 519–522
Iwanowa *v.* Ford Motor Co. (1999), 337

J

Jackson *v.* People's Republic of China (1986), 498, 500, 506
Jaeger *v.* Mitsubishi Materials Corp., 438*n*
Jane Doe I *v.* Islamic Salvation Front (1998), 337
Japan Line, Ltd. *v.* County of Los Angeles (1979), 422*n,* 426, 427, 453
Jenco *v.* Islamic Republic of Iran (2001), 528
Jennie Fuller, In the Matter of the Claim of (1971), 241*n*
Jin, et al. *v.* Ministry of State Security, 475
John Hancock Mutual Life Ins. Co. *v.* Yates (1936), 456
Johnson *v.* Eisentrager (1950), 982–984, 991, 1004*n*
JPMorgan Chase Bank *v.* Traffic Stream (BVI) Infrastructure Ltd. (2002), 227–231
*Juan Raul Garza *v.* United States (2001), 265*n*
Jung Tang *v.* Chinese Cultural Center (2002), 535–545
Juragua Iron Co. *v.* United States (1909), 988

K

Kadic *v.* Karadzic (1996), 324, 334–335, 337, 340–341, 343, 353, 563–564, 583
Kaepa, Inc. *v.* Achilles Corp. (1996), 866*n,* 872
2120 Kalorama Rd, Inc. *v.* District of Columbia Foreign Missions Act-Board of Zoning Adjustment (2001), 576
Kamya *v.* United Nations, 570–572
Kao Hwa Shipping Co. *v.* China Steel Corp. (1993), 515–516
Kasi *v.* Angelone (2000), 77
Kasi *v.* Angelone (2002), 77–78
Kasi *v.* Commonwealth (1998), 77
Kasi *v.* Virginia (1999), 77
Kato *v.* Ishihara (2002), 477–478
Kent *v.* Dulles (1958), 14, 15
Kinsey *v.* United States (1988), 511
Kirkpatrick & Co. *v.* Environmental Tectonics Corp. (1990), 573
Klinghoffer *v.* S.N.C. Achille Lauro (1991), 341
Kolovrat *v.* Oregon (1961), 440
Komet *v.* Republic of Finland (2001), 534–535
Kucinich *v.* Bush (2002), 198–202

L

Lafontant *v.* Aristide (1994), 474, 548, 551*n,* 563
*LaGrand (Germany *v.* United States) (1999), 40, 42, 46, 47
Laker Airways *v.* Sabena, Belgian World Airlines, 866*n,* 867–868
Landgraf *v.* USI Film Products (1994), 496, 499, 514–515
Lane *v.* Pena (1996), 588
*Las Palmeras Case (2000), 1014
Lauritzen *v.* Larson (1953), 328
Lee, United States *v.* (1882), 549
Lernout and Hauspie Speech Products *v.* Stonington Partners (2001), 865–868
Letelier *v.* Republic of Chile (1984), 503
Leutwyler *v.* Queen Rania al Abdullah (2001), 548, 549*n*
Li, United States *v.* (2000), 215, 216
Liberian E. Timber Corp. *v.* Government of the Republic of Liber. (1987), 541
Lindh, United States *v.* (2002), 94, 1001–1008
Linear Products *v.* Marotech (2002), 862–863
*Loayza Tamayo Case (1997), 268*n*
*Loewen Group Inc. and Raymond L. Loewen *v.* United States of America, 623–641
Lopez, United States *v.* (1995), 57–58
Louisiana, United States *v.* (1950), 249*n,* 253

Ludecke *v.* Watkins (1948), 988
Lumen Constr., Inc. *v.* Brant Constr. Co., Inc. (1985), 861

M
Maalouf *v.* the Swiss Confederation (2002), 522
MacArthur Area Citizens Ass'n. *v.* Republic of Peru (1987), 542
Macharia *v.* United States (2002), 461–462
Macphail *v.* Oceaneering International (2002), 871–872
Made in the USA Foundation *v.* United States, 199, 201
Madsen *v.* Kinsella (1952), 988*n*
Magness *v.* Russian Fed'n (2001), 515
Maine, United States *v.* (1975), 249*n*
Mann, United States *v.* (1987), 215
Marbury *v.* Madison (1803), 340
Marcos, Human Rights Litigation, *In re* estate of (1994), 324
Maritime Ins. Co. Ltd. *v.* Emery Air Freight Corp. (1993), 436
Matimak Trading Co. *v.* Khalily (1997), 228
Matta-Ballesteros *v.* Henman (1990), 215, 216
*Megrahi *v.* Her Majesty's Advocate (2002), 111–112
Mehinovic *v.* Vuckovic (2002), 347–348
Mendaro *v.* World Bank (1983), 571
*Methanex Corporation *v.* United States, 626–623
Metro. Wash. Airports Auth. *v.* Citizens for the Abatement of Aircraft Noise, Inc. (1991), 989
Miami Light Project *v.* Miami-Dade County (2000), 450, 451
Michelin Tire Corp. *v.* Wages (1976), 453
Milena Ship Mgmt. Co. Ltd. *v.* Newcomb (1992), 99
Millen Indus., Inc. *v.* Coordination Council for N. Am. Affairs (1988), 540
Mitchell, United States *v.* (1980), 588, 589
Mitsubishi Materials Corp. *v.* Superior Court (2000), 435–440
Mollan *v.* Torrance (1824), 489
*Mondev International Ltd. *v.* United States, 607–616
Mukaddam *v.* Permanent Mission of Saudi Arabia to the United Nations (2000), 477
Mullaney *v.* Wilbur (1975), 1006*n*

N
National Coalition Gov't of the Union of Burma *v.* Unocal, Inc. (1997), 335
National Foreign Trade Council *v.* Natsios (1999), 447, 450, 451
Native Village of Evak *v.* Trawler Diane Marie, Inc. (1998), 251, 255
Nat'l City Bank of New York *v.* Republic of China (1955), 493
Nat'l Council of Resistance of Iran *v.* Dep't of State (2001), 91

Navarro Savings Association *v.* Lee (1980), 96
Nazi Era Cases Against German Defendants Litigation, *In re* (2001), 342–343
Nehme *v.* INS (2001), 8
Neil, United States *v.* (2002), 131–133
New York Times Co. *v.* City of New York Comm'n on Human Rights (1977), 450
Nixon, United States *v.* (1974), 590
Nordic Village, Inc., United States *v.* (1992), 588
Noriega, United States *v.* (1990), 1004*n*
Nuovo Pignone, Spa *v.* Storman Asia (2002), 877–879

O
O'Connell Mach. Co. *v.* M.V. «Americana» (1984), 515
Oetjen *v.* Central Leather Co. (1918), 340, 589

P
Padilla *v.* Bush (2002), 986, 998–1000
Palestine Liberation Organization, United States *v.* (1988), 554
Park *v.* Shin (2002), 478
Patricia Carrato *v.* United States (1983), 498
Patrickson *v.* Dole Food Company (2001), 480–481
People of Saipan *v.* Dep't of Interior (1974), 216*n*
People's Mojahedin Org. of Iran *v.* Dep't of State (1999), 91–92
Percheman, United States *v.* (1833), 222*n,* 225–226
Petit, et al. *v.* Ding, 475
*Petition of Mary and Carrie Dann, 367–382
Phillips Petroleum Co. *v.* Shutts (1985), 422, 423, 454
*Phosphates in Morocco (1938), 378
Pierce, United States *v.* (2000), 840
Pierson *v.* Ray (1967), 564
Pink, United States *v.* (1942), 426, 442, 448, 589
Plaintiff A *v.* Xia Deren (2002), 469–476, 575
*Pope and Talbot *v.* Canada, 642, 651–660, 662
Posadas *v.* National City Bank of N.Y. (1936), 545
Premier Steamship Corp. *v.* Embassy of Algeria (1971), 554
Price *v.* Socialist People's Libyan Arab Jamahiriya (2002), 530, 534
Princz *v.* Federal Republic of Germany (1994), 494, 496, 499–500, 501, 514
*Prosecutor *v.* Akayesu (1998), 350
*Prosecutor *v.* Aleksovski (2000), 350
*Prosecutor *v.* Blaskic (2000), 350
*Prosecutor *v.* Delalic (2001), 350, 351
*Prosecutor *v.* Kayishema (1999), 350

Q

Quill Corp. *v.* North Dakota (1992), 454
Quirin, *Ex parte* (1942), 987, 988*n,* 992, 996–997, 1000, 1004*n,* 1005

R

Radzanower *v.* Touche Ross (1976), 572
Rahmani, United States *v.* (2002), 93
Raines *v.* Byrd (1997), 199
Ralpho *v.* Bell (1977), 985
Rasul *v.* Bush (2002), 980–986
Reed, United States *v.* (1981), 216
Republic of Argentina *v.* Weltover (1992), 466, 487–488, 502, 521–522
Republic of Austria, Dorotheum GMBH & CO KG, and Osterreischische Industrieholding, AG, *In re* (2002), 503–511
Republic of Mexico *v.* Hoffman (1945), 548, 549
Republic of Peru, *Ex Parte* (1943), 497, 507, 548–549
Republic of Phillipines *v.* Marcos (1987), 561
Republic of Phillipines *v.* Westinghouse Elec. Corp. (1994), 866
*Request For Precautionary Measures (Detainees At Guantanamo Bay, Cuba), 1008–1017
Rhanime *v.* Solomon (2002), 552
Rice *v.* Santa Fe Elevator Corp. (1947), 443
Ring *v.* Arizona, 317
Rodriguez *v.* Cook (1999), 15
Rodriguez *v.* United States (1987), 543
Roeder *v.* Islamic Republic of Iran (2002), 523–527, 534
Romine *v.* Compuserve Corp. (1998), 860, 861
Rostker *v.* Goldberg (1981), 989
Ruggiero *v.* Compania Peruana de Vapores "Inca Capac Yupanqui" (1981), 563
Russian Volunteer Fleet *v.* United States (1931), 224*n*

S

S & Davis Int'l, Inc. *v.* Republic of Yemen (2000), 515
Sales *v.* Republic of Uganda (1993), 541
Saltany *v.* Reagan (1988), 474, 549*n*
Sampson *v.* Federal Republic of Germany (2001), 492, 494, 501, 589
*Santiago Marzioni (Argentina) (1996), 370
Sarei *v.* Rio Tinto PLC (2002), 333–343, 357, 574–575
Saroop *v.* Garcia, United States *ex rel.* (1997), 215–216
Saudi Arabia *v.* Nelson (1993), 465, 473, 502, 505, 520
Schooner Exchange *v.* M'Faddon (1812), 504, 561

Schooner Peggy, The United States *v.* (1801), 448
Seattle Totems Hockey Club, Inc. *v.* Nat'l Hockey League (1981), 866*n*
Segni *v.* Commercial Office of Spain (1986), 540
Seguros Commercial America *v.* Hall (2000), 216*n*
767 Third Avenue Associates *v.* Permanent Mission of the Republic of Zaire to the United Nations, 560, 565, 566, 567
Shanghai Power Co. *v.* United States (1983), 414
Siderman de Blake *v.* Republic of Argentina (1992), 335, 473
Ski Train Fire in Kaprun, Austria, *In re* (2002), 479–480
Smart *v.* Leeke (1989), 1006*n*
Smith *v.* Socialist People's Libyan Arab Jamahiriya (1996), 493, 494, 501
Smith *v.* Sperling (1957), 489
S.N.T. Fratelli Gondrand *v.* United States (1964), 414–415
*South West Africa Cases (1966), 379
Southern Pacific Co. *v.* Arizona (1945), 453
Spacil *v.* Crowe (1974), 548, 549
Springer *v.* Philippine Islands (1928), 525
Springfield Rare Coin Galleries, Inc. *v.* Johnson (1986), 450
S&S Mach. Co. *v.* Masinexportimport (1992), 542
Stafford Ordnance Corp. *v.* United States (1952), 511
Stanford *v.* Kentucky (1989), 291
Stanley, United States *v.* (1987), 235
Steel Improvement & Forge Co. *v.* United States (1966), 511
Stethem *v.* Islamic Republic of Iran (2002), 528
Stonington Partners *v.* Lernout & Hauspie Speech Products (2002), 865–868
Strickland *v.* Washington, 48
Subpoena Issued to Mary Erato, *In re* (1993), 84*n*
Suerte, United States *v.* (2002), 134–137
Sullivan *v.* State of San Paulo (1941), 553
Sumitomo Shoji Am., Inc. *v.* Avagliano (1982), 440
Sun Refining and Marketing Co. *v.* Brennan (1990), 860
Sun *v.* Taiwan (2000), 538
Surette *v.* Islamic Republic of Iran (2002), 533
Szabo *v.* CGU International Insurance (2002), 859–862

T

Tachiona *v.* Mugabe (I–IV) (2001–2002), 324–333, 474, 552*n,* 563
Taiheiyo Cement Corporation *v.* Superior Court, 440–456
Taiwan *v.* United States Dist. Ct. for the N. Dist. of Cal. (1997), 538
Tayyari *v.* New Mexico State University (1980), 450
Tel-Oren *v.* Libyan Arab Republic (1984), 215, 222*n,* 323–324, 326, 328–329, 340, 342

Temengil *v.* Trust Territory of the Pacific Islands (1989), 216
Terrence K., In the Matter of (1987), 553–554, 560
Texas, United States *v.* (1950), 249, 253
The Rapid (1814), 983*n*
Thompson *v.* Oklahoma (1988), 318*n*
Townsend *v.* Little (1883), 544
Trajano *v.* Marcos (1989), 342
Trans Commodities, Inc. *v.* Kazakhstan Trading House, S.A. (1997), 541
Trans World Airlines *v.* Franklin Mint (1984), 215
Transamerica Mortgage Advisors, Inc. *v.* Lewis (1979), 223
Traore *v.* State (1981), 554
Trapilo, United States *v.* (1997), 840
Trojan Technologies, Inc. *v.* Pennsylvania (1990), 450
Tuck *v.* Pan American Health Org. (1981), 563
Tudor City Place Assocs. *v.* Libyan Arab Republic Misson to the U.N. (1983), 540
Turkmani *v.* Republic of Bolivia (2002), 516
Turner Entertainment Company *v.* Degeto Film (1994), 862

U
Underhill *v.* Hernandez (1897), 475
Underwood *v.* United Republic of Tanz., (1995), 540
Ungar *v.* Islamic Republic of Iran (2002), 529
United Feature Syndicate *v.* Miller Features (2002), 863–864
*United Parcel Service of America, Inc. *v.* Canada, 661–665
United States *ex rel.* Saroop *v.* Garcia (1997), 215–216
United States of America *v.* County of Arlington (1983), 580
United States of America *v.* The American Institute in Taiwan, Wood *ex rel.* (2002), 245–246
United States *v.* Amer (1997), 59
United States *v.* Arbelo (2002), 8
United States *v.* Belmont (1937), 442
United States *v.* Bestfoods (1998), 483
United States *v.* California (1947), 248, 255
United States *v.* City of Glen Cove (1971), 581
United States *v.* Coplon (1949), 553
United States *v.* Cummings (2002), 57–58
United States *v.* Curtiss-Wright Export Corp. (1936), 442
United States *v.* De La Pava (2001), 215
United States *v.* Demanjuk (2002), 5–8
United States *v.* Enger (1978), 553
United States *v.* Gorshkow (2002), 5–6
United States *v.* Lee (1882), 549

United States *v.* Li (2000), 215, 216
United States *v.* Lindh (2002), 94, 1001–1008
United States *v.* Lopez (1995), 57–58
United States *v.* Louisiana (1950), 249*n,* 253
United States *v.* Maine (1975), 249*n*
United States *v.* Mann (1987), 215
United States *v.* Mitchell (1980), 588, 589
United States *v.* Neil (2002), 131–133
United States *v.* Nixon (1974), 590
United States *v.* Nordic Village, Inc. (1992), 588
United States *v.* Noriega (1990), 1004*n*
United States *v.* Palestine Liberation Organization (1988), 554
United States *v.* Percheman (1833), 222*n,* 225–226
United States *v.* Pierce (2000), 840
United States *v.* Pink (1942), 426, 442, 448, 589
United States *v.* Rahmani (2002), 93
United States *v.* Reed (1981), 216
United States *v.* Shewmaker (1991), 544
United States *v.* Stanley (1987), 235
United States *v.* Suerte (2002), 134–137
United States *v.* Texas (1950), 249, 253
United States *v.* The Schooner Peggy (1801), 448
United States *v.* Trapilo (1997), 840
United States *v.* Valentine (1968), 1004*n*
United States *v.* Vasquez-Velasco (1994), 133, 543
United States *v.* Verdugo-Urquidez (1990), 235
United States *v.* Walczak (1986), 214*n*
United States *v.* Will (1980), 526
United States *v.* Williams (1980), 135–136
United States *v.* Wong Kim Ark (1898), 230
United States *v.* Yan Long Xiong (2002), 133–134
United States *v.* Zabaneh (1998), 215
*United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany – AB–2002–4 – Report of the Appellate Body, 670–672
*United States – Section 211 Omnibus Appropriations Act of 1998 – AB–2001–7 – Report of the Appellate Body, 672–676

V

Valdez *v.* Oklahoma (2001), 45–48
Valentine, United States *v.* (1968), 1004*n*
Varrin *v.* Queen's University (2002), 872–873
Vasquez-Velasco, United States *v.* (1994), 133, 543
Verdugo-Urquidez, United States *v.* (1990), 235

Verlinden B.V. *v.* Central Bank of Nigeria (1983), 465, 488, 497, 505
Victory Transport Inc. *v.* Comisaria General de Abastecimientos y Transportes (1964), 510
Village of Gambell *v.* Hodel (1989), 250–251
*Villagran Morales Case (1997), 370
Virtual Countries, Inc, *v.* Republic of South Africa and South African Tourism Board (2001) (2002), 518–519
Vulcan Iron Works *v.* Polish Am. Mach. Corp. (1979), 551*n*

W
Wagner *v.* Islamic Republic of Iran (2001), 528
Walczak, United States *v.* (1986), 214*n*
Ware *v.* Hylton (1796), 448
Watson *v.* Employers Liability Assurance Corp. (1954), 454
Wei Ye *v.* Jiang Zemin (2002), 547–552, 585–595
Weinberger *v.* Rossi (1982), 214*n*
Weinstein *v.* Islamic Republic of Iran (2002), 527, 528
Whitney *v.* Robertson (1888), 221
Williams, United States *v.* (1980), 135–136
Wiwa *v.* Anderson (2002), 357
Wiwa *v.* Royal Dutch Petroleum Company and Shell Transport and Trading Company (2002), 352–355
Wong Kim Ark, United States *v.* (1898), 230
World War II era Japanese Forced Labor Litigation, *In re* (2000), 434–435, 437
World Wide Minerals *v.* Republic of Kazakhstan (2002), 574
W.S. Kirkpatrick & Co. *v.* Environmental Tectonics Corporation, Int'l (1990), 475, 490
Wulfsohn *v.* Russian Socialist Federated Soviet Republic (1923), 508

X
Xuncax *v.* Gramajo (1995), 336, 474

Y
Yamashita, *In re* (1946), 349–350, 988*n*
Yamashita *v.* Styer (1946), 438*n,* 439
Yan Long Xiong, United States *v.* (2002), 133–134
York River House *v.* Pakistan Mission to the United Nations (1991), 560

Z
Zabaneh, United States *v.* (1998), 215
Zemel *v.* Rusk (1965), 14

Zschernig *v.* Miller (1968), 426–427, 428–429, 443, 444, 447, 450, 451, 452
Zveiter *v.* Brazilian Nat'l Superintendency of Merchant Marine (1993), 477

Index

A
Abortion, 278, 301, 308–309, 770
Act of State Doctrine
  Alien Tort Claims Act jurisdiction and, 334, 339, 342, 358
  Bernstein letter, 508
  expropriation of corporate property, 573–574
  immunity and, 471, 474–475, 573–575
  U.S. foreign policy and, 474–475
Administrative Procedure Act, 99
Adoption
  acquisition of citizenship in, 9
  Hague Convention on Inter-Country Adoption, 286
Afghanistan, 463
  arms trade restrictions, 884–885
  cooperation in anti-terrorism actions, 890
  illicit drug production or transit, 123
  sanctions against Taliban, 881–884
  status of enemy combatant detainees captured in, 261–270, 976–986, 995–996
    Lindh case, 1001–1008
  women's rights in, 277, 279–280
Aggression, crime of, International Criminal Court jurisdiction, 152
Agreements
  Alaska-Chukotka Polar Bear Population, Agreement between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the, 800–805
  Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the (1993), 1040–1041
  Holocaust Era Insurance Claims, Agreement Concerning (2002), 430–434

Agreements (*continued*)
Privileges, Exemptions, and Immunities Between the American Institute in Taiwan and the Coordination Council for North American Affairs, Agreement on, 535–539, 543, 544–545
Refugee Status Claims from Nationals of Third Countries, Agreement for Cooperation in the Examination of, 31–35
Settlement of Certain Property Claims, Agreement Between the United States of America and the Government of the Socialist Republic of Vietnam Concerning the, 413–415
South Pacific Regional Environment Programme, Agreement Establishing the (1993), 790–791
Surrender of Persons to the International Criminal Court, Agreement between the Government of the United States of America and the Government of the Republic of Uzbekistan Regarding the (2002), 166–168
Trade-Related Intellectual Property Rights, Agreement on, 673
Agricultural trade reform proposal, 701–707
AIDS/HIV, 715–718, 805–807
Air transport
Aircraft
bilateral Open Skies agreements, 597–600
competency of European Union member states to conclude air services agreements, 598–600
Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 600–607
return of stolen, 61, 62, 64–65
Treaty on Open Skies (aerial observation), 1028–1032
warning regarding military aircraft wreckage in international waters, 737–738
Albania, 757
naturalization treaty, 202
Algeria, 278
Algiers Accords, 219, 523–524, 526–527, 632
Alien Tort Claims Act (Alien Tort Statute) (1789), 323–324, 909–910
accomplice liability under, 347–348, 351
act of state issues, 334, 342, 358
exhaustion of remedies requirements, 336–337
extraterritorial arrest as violation of, 346
forum non conveniens doctrine and, 339, 355–357
human rights claims, 323–324, 355–357
command responsibility and, 348–351
Indonesian citizens' claim against U.S. corporation, 357–363
liability for indirect participation, 351–355
Myanmar citizens' claim against U.S. corporation under, 343–344

Nigeria citizens' claim against European corporations under, 352–355
Nigeria citizens' claim against U.S. corporation under, 345–346
Papua New Guinea residents' claim against international corporation under, 333–343
Peruvian citizens' claim against U.S. corporation under, 344–345
by refugees from Bosnia-Herzegovina against Bosnian soldiers, 346–348
Zimbabwean citizens claim against Zimbabwean political party, 324–333
immunity of government official, 470–472, 475, 563–564
jurisdiction, 325–326, 328–329, 344, 346–348, 352–355
liability and damages determinations under, 325
state action requirement, 339–340, 346, 352–355
Alienage diversity statute, 227–231
Aliens
access to U.S. courts in habeas proceedings by aliens held outside the U.S., 980–986
"admitted" to the United States, 19–20
crewmen of foreign-flagged vessels performing longshore work, 756–757
procedures of military commissions for trial of non-U.S. citizens suspected of terrorism, 957–976
recognition of foreign driver's license of, 18–20
American Convention on Human Rights, 73, 263, 1013–1015
American Declaration on the Rights and Duties of Man, 49, 1015, 1016
claim against U.S. by American indigenous people, 367–382
American Institute in Taiwan, 79, 245–246, 796–798
American Servicemembers' Protection Act (2002), 168–175
Americans with Disabilities Act (1990), 283–285
Anti-Ballistic Missile Treaty (1972), 1027–1028
termination, 198–202
Antigua, 757
Anti-suit injunctions, 864–873
Antiterrorism Act (1996), 523–525, 532
Arbitration
Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 197, 873–875
agreement as implied waiver of diplomatic immunity, 571–572
discovery for use in foreign tribunal, 875–877
New York Arbitration Convention, 618–619, 620–621
UNCITRAL arbitration rules, 618–619, 620–621
See also Dispute resolution, North American Free Trade Agreement
Argentina, human rights abuses in, 270–271

Armenia, sanctions against companies trading with Iran, 1069
Armed conflict
  child protection in, 287–288, 293, 294–297
  vs. law enforcement, in anti-terrorism effort, 904, 906
  women and, 275–276
  See also Law of war
Arms control
  agreements with Russia, 1017–1023
    ABM Treaty, 198–202, 1022, 1028
    Joint Declaration on New Strategic Relationship, 1023–1027
    Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions (2002), 1017–1023
  Arms Export Control Act, 1066–1067, 1070
  biological and chemical weapons, 1032–1033, 1034, 1035–1038, 1065, 1068
  preemptive military action and, 947–957
  treaties *vs.* other international agreements, 177–178, 180–184
  treaty compliance, 1032–1035
  United Nations resolutions on Iraq disarmament, 934, 937–947
  U.S. military action against Iraq, 933–937
  See also Nonproliferation
Arms Export Control Act, 1066–1067, 1070
Arms trade
  North Korea–Yemen, 1052–1057
  restrictions on Afghanistan, 884–885
  See also Arms control
Asia Pacific Economic Cooperation forum, 119–121
Association of Southeast Asian Nations (ASEAN), 118–119
Asylum
  Agreement for Cooperation in the Examination of Refugee Status Claims from National of Third Countries, 31–35
  asylum-seekers in third countries, 30–31
  diplomatic compounds and, 36
  fear of persecution as basis for request for, 26–28
  persecution of returned asylum-seekers, 29
  requests from North Koreans in China, 35, 36
  treatment of detainees, 30
  for Vietnamese Montagnards in Cambodia, 24–25
Australia
  cooperation in anti-terrorism actions, 890
  environmental protection agreement, 791
  free trade agreement negotiations, 722
  parallel judicial proceedings, 871–872

Austria
  Holocaust victims' compensation agreements, 417
  immunity to claims arising from World War II Nazi atrocities, 503–511
  sovereign immunity claim by company indirectly owned by, 479–480

B
Bahamas
  Haitian immigrants in, 31
  illicit drug production or transit, 124
Bangladesh, immunity of UN diplomat from suit by domestic servant, 552–567
Bank Secrecy Act, 128
Bankruptcy law
  cross-border insolvency reform, 821–822, 828
  parallel judicial proceedings, 863–864
    anti-suit injunction, 865–868
Barbados, 757
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 775, 783–785
Belarus
  human rights in, 278, 282
  Open Skies (aerial observation) treaty, 1029
Belgium
  naturalization convention, 202
  Open Skies (aerial observation) treaty, 1029
  parallel judicial proceedings, 865–868
  universal application of national criminal statutes, 909
Belize, law enforcement treaties, 61, 62, 66, 68
Biological and chemical weapons, 1068
  Chemical and Biological Weapons Control and Warfare Elimination Act (1991), 1068
  Chemical Weapons Convention, 1032–1033, 1034
  Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction (1972), 1032–1033, 1034, 1035–1038, 1065
  coverage under Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 106–107
Bipartisan Trade Promotion Authority Act (2002), 719–722
Bolivia, 516
  illicit drug production or transit, 124

Boundary issues
archipelagic waters, 258–259
claims to submerged lands, 246–259, 738–756
Eritrea-Ethiopian conflict, 925–926
juridical bays, 747–756
limits of continental shelf, 732–737
Presidential permits for construction and maintenance of border facilities, 607
regulation of cross-border motor carriers, 666–670, 819–820
smart-border plans, 121
territorial sea limits, 255–259
U.S.-Mexico water agreement, 757–759
Bosnia-Heregovina
human rights violations in, 346–348
UN peacekeeping mission, 157–161
Brazil, immunity to claims arising from bond marketing, 519
British Virgin Islands, alienage diversity jurisdiction case, 227–231
Brunei Darussalam, 118, 757
Brussels Declaration of 1874, 1005*n*
Bulgaria, continuous nationality rule, 632–633
Burma
human rights in, 278, 282
illicit drug production or transit, 123, 124
U.S. state sanctions against, 446
Bus Regulatory Reform Act (1982), 666

C
Cambodia
anti-terrorism cooperation, 118
textile agreement, 725–726
Vietnamese Montagnard refugees in, 24–25
war crimes prosecution in, 148
Canada
agreement covering third-country asylum claims at U.S. border, 31–35
extradition treaty protocol, 61, 62, 64, 69
limitation on cooperation in tax claim enforcement in U.S. court, 837–841
NAFTA Chapter 11 claims against, 661–665
Open Skies (aerial observation) treaty, 1029
parallel judicial proceedings, 862–864, 872–873
Presidential permits for construction and maintenance of U.S. border facilities, 607

reciprocity in recovery of family support obligations, 841–842
smart-border plans, 121
Capital Post-Conviction Procedure Act, 47
Capital punishment
clemency requests for Mexican nationals in U.S. custody, based on lack of consular notification, 39–52
juvenile offenders, 291
refusal of mutual legal assistance in capital cases, 69–70
U.N. resolution on extrajudicial, summary or arbitrary execution, 318–320
U.S. policy and practice, 316–318
Carriage of Goods by Sea Act, 830
Chemical and Biological Weapons Control and Warfare Elimination Act (1991), 1068
Chemical Weapons Convention, 1032–1033, 1034
Child Citizenship Act (2000), 8, 9
Child support, denial of passport to person's owing, 13–15
Children
acquisition of citizenship in adoption, 9
citizenship of child conceived *in vitro,* 10–11
consular assistance for, 59–60
Convention 182 on the Worst Forms of Child Labor (ILO) (1999), 286–287, 288, 289
Hague Convention on Inter-Country Adoption, 286
international abduction
"custody" definition and, 54–56
extradition treaty provisions, 70–71
Hague Convention on the Civil Aspects of International Child Abduction, 52–53, 54–56, 58–59, 286
International Parental Kidnapping Crime Act, 56–59
passport issuance for abducted child, 12–13
Sweden's compliance with, 75–76
visa ineligibility of persons involved in, 52–54
international recovery of family support obligations, 841–858
labor issues, 286–287, 288, 289
parental rights, 286, 291–292
"custody" under Hague Convention, 54–56
rights of girl child, 304
two-parent consent for passport issuance, 11–13
United Nations Rights of the Child resolution, 302–303
United Nations Special Session on Children, 300–302
of U.S. citizens born abroad, 8
U.S. participation in treaties protecting, 285–297
See also Convention on the Rights of the Child

Chile
liability for indirect participation in human rights violations in, 351–352
free trade agreement, 723
restrictions on work performed by longshoremen from, 757
China, People's Republic of, 245
cooperation in anti-terrorism actions, 890
head of state immunity for president of, 547–552
human rights in, 278, 282
in Hong Kong, 384–385
illicit drug production or transit, 124
immunity of corporation owned by, 516–517
immunity of government official to suit for human rights abuses, 469–476
North Korean refugees in, 35–38
population planning policies, 309
sanctions against companies trading with Iran, 1067–1071
service of process on visiting foreign officials of, 581–595
World War II-era claims against Japan, 444–446
Citizenship
of adopted child, 9
of child conceived *in vitro,* 10–11
of children of U.S. citizens born abroad, 8
of corporations, 227–231
dual, and employment in U.S. consular and diplomatic missions, 1–4
revocation based on participation in World War II Nazi atrocities, 5–8
rights of U.S. citizens detained as enemy combatants, 986–1000
See also Nationality
Civil Rights Act (1964), 477
Civil Rights Act (1991), 514–515
Clean Air Act, 670
Clemency requests for Mexican nationals in U.S. custody, based on lack of consular notification, 39–52
Cloning technology, 807–809
Colombia, illicit drug production or transit, 124
Comité Maritime Internationale, 831
Comity, 517
anti-suit injunctions and, 872–873
comity-based abstentions in international civil litigation, 859–864
Commerce, Justice, State Appropriations Act (2001), 523
Common law definition of persecution, 26
Community of Democracies, 382–384

Competency, mental
clemency request and, 49–50
passport issuance and, 17–18
Conflict resolution
Eritrea-Ethiopian border issues, 925–926
in Haiti, 926–931
institutional mechanisms for, 902–903
in Middle East, 910–919
role of international law in, 901–910
in Sudan, 919–925
Congo, Democratic Republic of, 139–142, 320
Constitution, U.S.
allocation of war powers, 987–989
applicability of doctrine of procedural default, 46, 47
Article I, 987–988, 994
Article II, 175, 202, 589–590, 958, 988, 994, 995–996
Article III, 198, 228, 229, 341, 988, 993
asset freezing procedures and, 97–101
Commerce clause, 56–58, 416, 420, 421–422, 453, 455
denial of passport as claimed violation of travel rights, 13–15
designation of terrorist organizations and, 93–94
diplomatic immunity practices and, 561–565
equal protection, 58
on extraterritorial jurisdiction, 135, 136
Fifth Amendment, 14, 15, 58–59, 98, 101, 243, 460–461, 986–987
First Amendment, 14, 98, 292, 869, 870–871
foreign affairs authority, 416–417, 447–452, 453, 525
federalism issues in international agreements, 191, 192, 290–291
Foreign Relations Authorization Act and, 242–245
making of treaties and other international agreements, 178–180, 242–243
service of process on visiting foreign official and, 581, 586–588
state law as intrusion into, 448–4491
termination of treaties, 198, 199–200, 201–202
Foreign Commerce Clause, 429, 453–454
Fourteenth Amendment, 416, 420, 421–425, 986–987
Fourth Amendment, 98, 99, 101
habeas corpus claims by U.S. citizens detained in U.S. as enemy combatants, 986–1000
Holocaust Victims Insurance Relief Act (California, 1999) and, 415–429
paramount rights doctrine, 246–259
on private right to force disclosure of intelligence information, 231–236

Constitution, U.S. (*continued*)
on right to control submerged lands, 246–259
Supremacy Clause, 198, 246, 253–254, 1003–1004
Tenth Amendment, 191
Thirteenth Amendment, 553
Consular functions
assistance for children, 59–60
notification of consul in detention of foreign nationals
clemency requests based on lack of, 39–48, 50–52
Mexican nationals in U.S., 39–48, 50–52
U.S. training to improve compliance, 51
Consular offices and personnel
inviolability, 37
location of buildings, 576
See also Employees of consular and diplomatic missions
Container Security Initiative, 120
Control and seizure of assets
to compensate victims of terrorist attacks, 408, 410–413
constitutionality, 97–101
of designated terrorist organization chartered in U.S., 94–98
immunity of Libyan mission to United Nations, 576–579
protective blocking of Russian property relating to the downblending of Russian uranium stocks, 1039–1041
unblocking of blocked assets of Yugoslavia (Serbia and Montenegro), 897–900
Conventions
Arbitration Convention, UNCITRAL, 618–619, 620–621
Bacteriological and Toxin Weapons and on their Destruction, Convention on the Prohibition of the Development, Production and Stockpiling of (Biological Weapons Convention) (1972), 1032–1033, 1034, 1035–1038, 1065
Biological Diversity, Convention on, 769–770
Child Labor, Convention 182 on the Worst Forms of (ILO) (1999), 286–287, 288, 289
Climate Change, UN Framework Convention on, 781–782
Consular Relations, Vienna Convention on
Articles:
5, 59–60
35, 40–41
36, 39–41, 44, 45, 50–51
on consular assistance for children, 59–60
on consular notification of nationals, 39–41, 42, 44, 45, 46, 47, 50–51

immunity provisions, 478
protection of consular property under, 410, 411, 412
Contracts for the International Sale of Goods, Convention on, 824
Corruption, Inter-American Convention Against (1996), 117
Cultural Property, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of (1972), 813
Diplomatic Relations, Vienna Convention on, 558–559, 561, 564
Articles:
23, 580
24, 569
27, 569–570
29, 551
41, 564
dual nationality provisions, 4
immunity of diplomats, 558–559, 561, 564
inviolability of Saudi Arabian embassy documents, 567–570
on personal inviolability, 551
protection of diplomatic property under, 410, 411, 412, 577
Discrimination Against Women, Convention on the Elimination of All Forms of, 277–280
Foreign Arbitral Awards, Convention on the Recognition and Enforcement of (New York Convention)(1958), 197, 873–875
Geneva Conventions, 337, 972–973, 975, 1014, 1016
Common Article 3, 921
See Prisoners of War under this heading
Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Convention for the Conservation and Management of (1987), 188
Intellectual Property, International Convention for the Protection of, 518
Inter-American Tropical Tuna Commission, Convention on the Establishment of an (1949), 792
Inter-Country Adoption, Hague Convention on (1993), 286, 299
International Carriage by Air, Convention for the Unification of Certain Rules for (1955) (Hague Protocol), 600–607
International Carriage by Air, Convention for the Unification of Certain Rules Relating to (1999) (Montreal Convention), 602, 603, 605
International Carriage by Air, Convention for the Unification of Certain Rules Relating to (1929) (Warsaw Convention), 600–607

Conventions (*continued*)
International Child Abduction, Hague Convention on the Civil Aspects of (1980), 52–53, 58–59, 286
"custody" defined, 54–56
Swedish compliance, 75–76
International Interests in Mobile Equipment, Convention on, 759, 818, 823, 825–826, 827
Law Applicable to Maintenance Obligations, Hague Conventions on the (1956 and 1973), 842
Law of the Sea, UN Convention on the, 731–732
Alien Tort Claims Act jurisdiction, 334, 339
Fish Stocks Agreement, 786, 797
limits of continental shelf, 732–737
Laws and Customs of War, Hague Convention Respecting the (1907), 1005–1006
Limitations, Sales of Goods, Negotiable Instruments, and Guarantees, Conventions on, 836
Maintenance Obligations, Hague Conventions on the Recognition and Enforcement of Decisions Relating to (1956 and 1973), 842
Marine Environment of the Wider Caribbean Region, Convention for the Protection and Development of the (1990), 792–794
Maritime Navigation, Convention for the Suppression of Unlawful Acts Against the Safety of (1988), 133–134
proposed anti-terrorism amendments, 104–110
Protocol Related to Fixed Platforms Located on the Continental Shelf, 104–105, 110
Narcotic Drugs and Psychotropic Substances, Convention Against Illicit Traffic in (1988), 122, 126, 137
Mutual Assistance in Criminal Matters, International Convention on (1992), 117
Nuclear Materials, Convention on the Physical Protection of, 1072
Persistent Organic Pollutants, Stockholm Convention on, 771–777
Pollution from Ships, International Convention for the Prevention of (1973), 184–185
Prisoners of War, Geneva Convention Relative to the Treatment of (1949), 438–439, 974
military commissions, 974
unlawful enemy combatant detainees suspected of terrorist acts and, 976–980, 992–993, 1003–1008, 1015
Prisoners of War, Convention Relative to the Treatment of (1929), 438–439

Privileges and Immunities of the United Nations, Convention on the (General Convention), 554, 555, 557–561 564–565, 571
Racial Discrimination, International Convention on the Elimination of all Forms of, 274
Recovery Abroad of Maintenance, New York Convention on the (1956), 842
Refugees, Convention Relating to the Status of (1951), 185, 193, 289
  Protocol Relating to the Status of Refugees (1967), 32, 37, 185, 289
  U.S. state law and, 193–194
Regulation of Whaling, International Convention on the (1953), 206–212
Reproductive Cloning of Human Beings, International Convention Against, 807–809
Rights of the Child, Convention on the 183–184, 285, 287, 289–293, 303
  Protocol on the Involvement of Children in Armed Conflict, 184, 287–290, 293
    U.S. understandings and conditions, 294–297
  Protocol on the Sale of Children, Child Pornography and Child Prostitution, 184, 287, 288–290, 293
    U.S. reservations, understandings and declarations, 297–300
  U.S. objections, 290–293, 303
Road Traffic, Convention on (1949), 20–22
Sales Convention, Vienna, 820
Service Abroad of Judicial Documents in Civil and Commercial Matters, Convention on (Hague Service Convention) (1965), 877–879
Territorial Sea and the Contiguous Zone, Convention on the (1964), 738, 742, 747–750, 753–754
Terrorism, International Convention for the Suppression of the Financing of, 106, 108, 113–114, 116–117, 891
Terrorism, Inter-American Convention Against, 112–117
Terrorist Bombings, International Convention for the Suppression of, 106, 109–110, 116–117
Torture and Inhuman or Degrading Treatment or Punishment, European Convention for the Prevention of, 1015–1016
Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention Against (1984), 195, 313–315
Transit of Goods for Trade with Land-locked States, Convention on, 837
Transnational Organized Crime, Convention Against, 110
Transport Terminals, Convention on, 836

Conventions (*continued*)
Treaties, Vienna Convention on the Law of (1969)
Articles:
4, 208
5, 208–209
19, 211–212
20, 208–209
31, 268, 619, 621, 656
32, 436–437
on reservations, 208–209, 393–394
on treaty interpretation, 653
on treaty responsibility prior to entry into force, 609–610
World Cultural and Natural Heritage, Convention for the Protection of (1992), 198
See also Agreements; International Covenants; Treaties
Cook Islands
environmental protection agreement, 791
restrictions on work performed by longshoremen from, 757
Corporate responsibility
Johannesburg Declaration on Sustainable Development, 765–771, 782
Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, 727–728
Corruption, Council of Europe Convention on, 195–196
Costa Rica, 64, 65, 68, 73, 781
hazardous waste disposal agreement, 783–784
naturalization convention, 203
Council of Europe Corruption Convention, 195–196
Council of Europe Cybercrime Convention, 196–197
Covenant To Establish A Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 246–259
Crimes against humanity, 321
Alien Tort Claims Act jurisdiction, 323, 331, 334, 337–338, 346–348, 351–354
claim in Bosnia-Herzegovina under Alien Tort Statute, 346–348
Sierra Leone Special Court, 147–148
sovereign immunity and, 491–492
Torture Victims Protection Act jurisdiction, 353–354
U.N. resolution on enforced disappearances, 320
Croatia, 278
Cuba, 1065
claims by Cuban nationals for U.S. Civil Service benefits, 236–242
U.S.–Cuba Migration Accords, 20–22

World Trade Organization case challenging U.S. trademark law, 672–676
Cuban Assets Control Regulations, 674–675
Cultural heritage,
cultural property protection agreement, 813–815
intangible cultural heritage, draft convention on, 311–312
rights of indigenous peoples, 365–366
Customary international law
cause of action, 225
continuous nationality rule, 395, 626–632
development of, 327, 330, 657–658, 659
diplomatic immunity, 561–563
diplomatic protection of corporate entities, 394
environmental conduct under, 344–345
human rights concepts in, 326–327, 328–331, 336, 347, 351, 353
immunity of lawful enemy combatants, 1002–1005
inter-temporal application of law and, 379
local codification, 330–331
military commissions, 974–975
minimum standard of treatment of aliens, 611, 614, 648–650, 656–657
obligations of good faith, 661
pacta sunt servanda, 661
preemptive military self-defense, 951, 953
resources for identifying, 335
rights of indigenous peoples and, 380
sharing of transboundary natural resources, 396
sovereign immunity and violations of, 467, 473, 492
torture, 353
treaty interpretation, 653
treaty obligations of constituent parts of a State, 643
UN Convention on the Law of the Sea as reflecting, 339
Cybercrime, Council of Europe Convention on, 196–197
Cyprus, cultural property protection agreement, 813–815
Czech Republic
naturalization treaty, 203
Open Skies (aerial observation) treaty, 1029
Czechoslovakia naturalization treaty, 202–203

D

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran. *See* Algiers Accords

Declaratory Judgment Act, 868–871
Democracy
  Community of Democracies, 382–384
  attempted military coup in Venezuela and, 385–387
Denmark, 210
  naturalization convention, 203
  Open Skies (aerial observation) treaty, 1029
  Reservation to International Whaling Convention, 210
Department of Defense and Emergency Supplemental Appropriations Act (2001), 523
Development, right to, 304–307
Diplomatic missions and personnel
  diplomatic protection of corporate entities, 394
  immunity
    of dual national at U.S. mission abroad, 4
    from suit by domestic servant of, 552–567
    injuries sustained on embassy grounds, 522
    reciprocity in, 565–567
  status of Taipei Economic and Cultural Representative Office in the United States, 536–537, 538–539
  inviolability, 37
  location of buildings, 576
  requests for asylum in diplomatic compounds, 36
  tax exemption, 576–581
  See also Consular offices and personnel; Employees of consular and diplomatic missions
Diplomatic relations
  Afghanistan, 463
  East Timor, 463–464
  See also Vienna Convention on Diplomatic Relations under Conventions.
Diplomatic Relations Act (1978), 558, 561–562
Disabilities, persons with, 283–285
Discovery, for use in foreign tribunal, 875–877
Displaced Person Act (1948), 6–7
Dispute resolution, 392–393. *See also* Arbitration
Divorce, *ne exeat* clause and international child abduction, 54–56
Dolphin Protection Consumer Information Act, 795
Dominican Republic, 31, 68
  illicit drug production or transit, 124
Drug trade
  interdiction on high seas of foreign-flagged vessel, 133–137
  International Narcotics Control Strategy Report, 125–126

Maritime Drug Law Enforcement Act (2002), 134–137
U.S. sanctions on drug producing and drug-transit countries, 122–125
Due process
claim in IACHR against U.S. by indigenous people, 370
clemency request for Mexican national in U.S. prison, 49–50
constitutionality of California's Holocaust Victims' Insurance Relief Act, 416, 420–421, 422–423, 425
constitutionality of California's World War II forced labor statute, 454, 455
executive branch foreign affairs authority and, 243, 989–990
extraterritorial jurisdiction and, 135, 421, 422–423, 454
FSIA and, 465, 500, 534
in Indian Claims Commission case, 376–377
international travel rights and, 14
military commissions and, 973–974
personal jurisdiction requirement, 534, 875
in petitions for habeas corpus by U.S. enemy combatants, 989–990, 996–997
service of process on visiting foreign officials, 581–585
terrorist organization designation as violation of, 91–94

E
East Timor, 177, 903
UN Mission in Support of, 157–158
U.S. diplomatic relations, 463–464
Ecuador
citizens' claim against U.S. corporation under Alien Tort Claims Act, 355–357
illicit drug production or transit, 124
Egmont Group, 892–893
Egypt, transfer tax on sale of diplomatic property belonging to, 579–581
El Salvador
citizens of U.S. claim against military commanders under Torture Victims Protection Act, 348–351
naturalization convention, 203
Electronic commerce, 820, 834–837
Employees of consular and diplomatic missions
claims of U.S. employees in Vietnam, 413–415
dual nationality and diplomatic immunity, 4
President's authority, 244
suit by foreign civil servant in U.S., 477–478

Enemy combatants
designation as, in United States, 990–997, 998–1000, 1001–1008, 1008–1017
of U.S. citizens, 996–997
immunity of lawful enemy combatants, 1002–1005
status, 904–905, 976–980
habeas corpus, 980–1000
rights of U.S. citizens designated as, 986–1000, 1001–1008
Environmental protection
Alien Tort Claims Act jurisdiction, 333–334, 339–340, 344–345, 355–356, 357
Antarctica agreement, 798–800
biological diversity, 769–770
convention on persistent organic pollutants, 771–777
dolphin-safe tuna, 794–796
global climate change, 777–782
hazardous waste management, 783–785
International Convention for the Prevention of Pollution from Ships, 184–185
liability for consequences of acts not prohibited by international law, 395–396
marine resources, 785–798
ozone depletion, 777
plant genetic resources, 810–811
Rio Declaration on Environment and Development, 768–769
Russia–U.S. agreement on protection of polar bears, 800–805
World Summit on Sustainable Development, 765–771, 787
Equal protection, 58
Eritrea, Ethiopian border dispute, 925–926
Estonia, 757
Ethiopia, Eritrean border dispute, 925–926
European Commission on Human Rights, 266–267, 268, 1015
European Community, steel import duties, 697
European Court of Human Rights, 265, 266–267, 268
European Court of Justice rulings on Open Skies air transport agreements, 598–600
European Police Office, 80–84, 467–469
European Union
competency of member states to conclude air services agreements, 598–600
International Criminal Court Article 98 Agreements, 166
Israeli–Palestinian conflict resolution efforts, 916–919

World Trade Organization cases
challenge of U.S. anti-subsidy law involving steel products, 670–672
challenge of U.S. trademark law, 672–676
dispute on foreign sales corporation provisions in U.S. tax law, 677–693
Evidence
discovery for use in foreign tribunal, 875–877
procedures of military commissions for trial of non-U.S. citizens suspected of terrorism, 966, 967–969, 975
Executive branch
authority to designate unlawful enemy combatants, 990–991, 996, 997, 998–1001, 1006
authority to withhold information from Congress and public, 231, 233–236, 242–245
foreign affairs authority
California's Holocaust victims' compensation legislation and, 416–417, 420–421, 422, 426–429
Foreign Relations Authorization Act and, 242–245
immunity determinations, 548–549
to make international agreements, 178–181, 242–243, 525
as pre-empting state action, 447–452, 453
service of process on visiting foreign officials and, 586–595
to terminate treaties, 198–208
treaty interpretation, 1001
recommendations for foreign policy legislation, 243
responsibility for U.S. government employees, 244
Executive Orders
arms export controls (12581) (13222), 1066
blocking attachment of Russian property relating to the downblending of Russian uranium stocks (13159), 1039–1041
freezing assets of terrorist organizations (12947) (13224), 94–98, 100–101
permits for construction and maintenance of border facilities (11423), 607
procedures of military commissions for trial of non-U.S. citizens suspected of terrorism (12958), 958
sanctions against Taliban (13129) (13244) (13268), 882–884
Executive Orders (*continued*)
seizure of Libyan assets (12544), 577
unblocking of blocked assets of Yugoslavia (13192), 898
Export Administration Act (1979), 413, 1066, 1070
Export-Import Bank Reauthorization Act (2002), 726–727

Expropriation
Act of State Doctrine, 574
claims against Iran, 219–226, 519–522
by Cuba, 240–241, 672–676
diplomatic protection of corporate interests, 394
NAFTA Chapter 11 arbitrations, 617, 623–624, 649
sovereign immunity and claims arising from, 492–493, 508, 509–511, 519–522
trademark rights in connection with assets confiscated by Cuba, 672–676
Extradition
for child abduction charges, 70–71
of a country's own nationals, 63, 64
dual criminality basis for, 63
rendition of alien defendant from Pakistan and, 77–78
International Criminal Court Article 98 Agreements, 167–168, 170, 175
life imprisonment assurances in treaties, 70, 73–74
new treaties, 61, 62, 63–64
political offense exceptions, 109
prohibition on U.S. cooperation with International Criminal Court, 170
refusal without assurances, in death penalty cases, 69
temporary surrender of accused persons, 64
Extradition Treaties Interpretation Act, 71

F
False Claims Act, 245–246, 496
Federal Advisory Committees Act, 234
Federal Arbitration Act, 874–875
Federal Insecticide, Fungicide and Rodenticide Act, 775, 776, 777
Federal Tort Claims Act, 461
Federalism issues in international agreements, 190–198, 290–291
Fiji, environmental protection agreement, 791
Financial Action Task Force on Money Laundering, 115, 891–892
Financial transactions, international
electronic commerce, 820, 834–837
financing of international projects, 821
foreign sales corporation tax law, 677–693
money laundering, 126–131
secured financing standards, 818–819, 822–829
in support of terrorism, 89, 95, 115
international cooperation in disruption of, 888–893
Finland, sovereign immunity from claims related to taxation, 534–535

Fisheries management
Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 188
environmental protection and conservation agreements, 785–798
International Convention on the Regulation of Whaling, 206–212
right to control submerged lands in sovereignty relationship, 246–259, 738–756
Treaty on Fisheries Between the Governments of Certain Pacific Islands States and the Government of the United States of America, 186–190
UN Fish Stocks Agreement, 786, 797
Foreign affairs
authority to terminate treaties, 198–206
effect of adjudication of human rights suits involving foreign government officials, 357–363, 474–476
executive branch authority. *See* Executive branch, foreign affairs authority
federal government authority
California's Holocaust victims' compensation legislation and, 416–417, 420–421, 422, 426–429
California's World War II-era prisoners' compensation legislation and, 440–452
nonjusticiable political issues, 199–202
in human rights cases, 333, 339–344, 357–363, 495
one voice principle, 426–427, 429, 453–454
protection of intelligence and foreign relations information, 231–236, 994
Foreign assistance, 307–308, 770
family planning and, 308–309
global climate change initiatives and, 780–781
Foreign Assistance Act (1961), 122, 124, 125–126, 261, 413
Foreign Operations, Export Financing, and Related Programs Appropriations Act (2002), 122, 123, 124, 146, 308–309
Foreign Relations Authorization Act (2000) (2001)(2002), 124, 242–245, 398, 1042
Foreign Relations Authorization Bill Conference Report, 27, 29
Foreign Sales Corporation Repeal and Extraterritorial Income Exclusion Act (2000), 677, 678–679, 681–682
Foreign Sovereign Immunities Act (1976), 578–579
arbitration agreements as implied waiver of immunity, 571–572
commercial activity exceptions, 220, 502–503, 517–522
definition of foreign state in, 466–467, 468–469, 479–480, 489, 515–516, 536, 539–540

Foreign Sovereign Immunities Act (*continued*)
exceptions to immunity under, 220, 502–503, 517–522
commercial activity
attachment of certain bank accounts, 541–543
civil servants and, 477–478
origins of, 465–466, 505, 543–544
private company indirectly owned by foreign government, 479–491
retroactive application, 497–499, 506, 513, 516
expropriation, 508, 509–511, 520–522
takings, 497, 513–516
terrorism, 466, 471–472, 522–534
tort, 472, 522
waiver, 497, 516–517
violation of jus cogens and, 467, 491–494, 501
violation of customary international law and, 467, 473, 492
Europol, 467–469
harmonization with other agreements, 543–545
history of, 465, 505, 543–544
government officials under, 472–473, 477–478
liability for human rights abuses, 469–476
Taiwan cultural center in personal injury suit, 535–545
retroactive application, 492–493, 497–499, 516
bracero claims against Mexican defendants, 511–513
claims against Austria for World War II Nazi atrocities, 503–511
claims against Japan by Korean "comfort women," 494–503
scope, 466–469
tax claims and, 534–535
Forum non conveniens doctrine
Alien Tort Claims Act, Torture Victims Protection Act jurisdiction, 339, 345–346, 355–357, 481
in contract claims against Brazil, 519
France
environmental protection agreement, 791
immunity under Foreign Sovereign Immunities Act, 517
Open Skies agreement, 597–598
Open Skies (aerial observation) treaty, 1029
Franchising, 820–821
Freedom of Information Act, 234

G
G-8 countries
Action Plan for Africa, 307
counter-terrorism recommendations, 121–122

General Convention. *See* Convention on the Privileges and Immunities of the United Nations
Geneva Conventions. *See* Conventions
Genocide
  claim in Bosnia-Herzegovina under Alien Tort Statute, 346–348
  International Criminal Tribunal for Rwanda, 137–142
Georgia, Open Skies (aerial observation) treaty, 1029
Germany, 56–58
  Holocaust victims' compensation agreement, 417, 418, 427, 428, 431–434
  Open Skies (aerial observation) treaty, 1029
  U.S. anti-subsidy law involving steel products, 670–672
Ghana, new passport for U.S. citizen escaped from custody in, 17–19
Government in the Sunshine Act, 234
Greece, Open Skies (aerial observation) treaty, 1029
Grenada, 757
Guam, 250
Guantánamo Bay, 976, 978–980, 983–986
Guatemala, 68
  cultural property protection agreement, 813
  illicit drug production or transit, 124

H
Habeas corpus
  enemy combatants detained outside sovereign territory of U.S., 980–986
  forcible abduction of alien defendant from Pakistan, 77–78
  rights of U.S. citizens detained as enemy combatants, 986–1000
Hague Conference on Private International Law, 817–818, 826, 829
  proposed instrument for the recovery of child and family support obligations, 842–858
Hague Conventions. *See* Conventions
Haiti
  illicit drug production or transit, 123, 124
  naturalization treaty, 203
  Organization of American States stabilization efforts, 926–931
  refugees from, 25–31
Head of state immunity
  Executive Branch determinations of eligibility, 548–550
  Falun Gong suit against Chinese president, 547–552
  liability as agent of political party, 324–325
Helsinki Declaration, 345–346
HIV/AIDS, 715–718, 805–807
Holocaust Victims Insurance Relief Act (California, 1999), 415–429

Honduras
extradition treaty, 68
law enforcement cooperation relationship, 67, 68
naturalization convention, 203
stolen vehicle treaty, 61, 62, 64–65
Human rights
access to food, 310–311
Alien Tort Claims Act jurisdiction, 323–324, 325–326, 328–329, 333–343, 344, 346–348, 352–357, 909–910
anti-terrorism efforts and, 358, 360, 387–388
antidiscrimination efforts
persons with disabilities, 283–285
racism, 271–275
religious freedom, 280–282
women's rights, 277–280
in Argentina, 270–271
Article 36 provisions of Vienna Convention on Consular Relations, 50
authority of Inter-American Commission on Human Rights to adopt precautionary measures, 261–269
child protection, 285–293
claims of violations and foreign policy interests, 357–363
command responsibility as basis for liability for violations of, 348–351
customary international law, 326–327, 328–331, 336, 347, 351, 353
Draft Optional Protocol to Convention Against Torture, 313–315
environmental harms as violation of, 333–334, 339–340, 344–345, 357
federalism issues in international agreements, 191, 290–291
Foreign Sovereign Immunities Act jurisdiction, 469–476, 477–478, 491–494, 501
of girl child, 304
in Hong Kong Special Administrative Region of China, 384–385
of indigenous people
claim against U.S., Inter-American Commission on Human Rights report on, 367–382
OAS draft declaration, 364–367, 379–381
UN draft declaration on internal self-determination, 363
under Inter-American Convention Against Terrorism, 116–117
in Iraq, 945
laws of armed conflict and, 1009–1011, 1013–1017
liability for indirect participation in violation of, 351–355
municipal law *vs.* international law, 329–331
reproductive rights, 308–309

right to development, 304–307
State Department Country Reports, 261
Torture Victims Protection Act (1992) claims, 324–325, 336, 348–355
U.N. resolution on enforced disappearances, 320
universal application of national criminal statutes, 909
Zimbabwean citizens claim against Zimbabwean political party, 324–333
Humanitarian law, *see* Law of war
Hungary, Open Skies (aerial observation) treaty, 1029

I
Iceland
Open Skies (aerial observation) treaty, 1029
reservations to International Convention on the Regulation of Whaling, 206–212
Immigration and Nationality Act, 8, 9, 19, 29, 32, 413
Convention on the Rights of the Child and, 292–293
denial of entry, 16
designation of terrorist organizations, 85, 86–89, 102
longshore work by aliens, 756
recognition of foreign driver's license of alien, 18–20
Terrorist Exclusion List, 102–104
on visa ineligibility of persons involved in international child abduction, 52–54
Immigration and Nationality Act (1952), 23, 756
Immigration and visa
concealment of participation in Nazi atrocities on visa application, 5–8
Cuba–U.S. Migration Accords, 20–22
suspension of entry to U.S. of certain persons connected with Zimbabwe, 22–24
Immunity
Act of State Doctrine and, 573–575
diplomatic
customary international law, 561–563, 566
of dual national abroad, 4
for international organizations, 570–573
suit by domestic servant against government official, 552–567
of UN personnel, 555–560
of lawful enemy combatants, 1002–1005
head of state, 547–552, 587
as agent of political party, 324–325
service of process and, 551–552, 586–595

Immunity (*continued*)
sovereign
of agents and instrumentalities of U.S. government, 245–246
before Foreign Sovereign Immunities Act, 465, 492–494, 497–501, 503–513
foreign *vs.* domestic, 488–489
restrictive theory, 465–466, 488–489, 505
under UN Convention, 571–572
of U.S. municipal agency, 607–609, 614–616
See also Foreign Sovereign Immunities Act
India
Antarctica environment agreement, 798–800
child abduction to, 58–59
hazardous waste disposal agreement, 783–785
illicit drug production or transit, 124
mutual legal assistance treaty, 61, 62, 66–67
religious persecution in, 282
sanctions against companies trading with Iran, 1070–1071
Indian Claims Commission Act (1946), 371, 378, 379
Indigenous people
claim against U.S. by, Inter-American Commission on Human Rights report on, 367–382
collective tribal claims *vs.* aggregated individual claims, 370–373
OAS draft declaration on rights of, 364–367, 379–381
UN draft declaration on rights of, 363
Indonesia, 575
anti-terrorism cooperation, 118
citizens' claims against U.S. corporation for human rights violations, 357–363
cooperation in anti-terrorism actions, 890
Intellectual property
drug research and development, 718
plant genetic resources, 810–811
See also Trademark law
Inter-American Commission on Human Rights, 73, 315
on claims against U.S. by indigenous people, 367–382
jurisdiction, 369
limitations on, 1008–1017
precautionary measures authority, 261–269, 1008–1017
mandate, 262–264
petition on behalf of Mexican national in U.S. prison, 48–52
statute of, 381
Inter-American Court of Human Rights, 50, 73, 263, 265, 268

Interim Agreement between the United States and the [former] USSR on Certain Measures with Respect to Limitation of Strategic Offensive Arms, 181
International agreements other than treaties
arms control agreements, 177–183
Constitutional concepts, 178–180
pursuant to constitutional authority of the President, 181
pursuant to legislation, 181
pursuant to treaty, 181
ratification of protocols of convention without ratification of underlying convention, 183–186, 288–289
U.S. State laws and, 182, 190–198
International Atomic Energy Agency, 572–573, 945, 957, 1041, 1045, 1047
Additional Protocol, 1034, 1057–1062
North Korean nuclear program, 1045–1046, 1052
International Child Abduction Remedies Act, 55, 56
International Civil Aviation Organization, 818, 823
International Code of Conduct against Ballistic Missile Proliferation, 1062–1065
International Commission on Holocaust Era Insurance Claims, 417–419, 430–434
International Conventions. *See* Conventions
International Court of Justice, 902, 909
issuance of precautionary measures, 265
open to public, 712
recognition of customary international law, 637, 661, 658, 659
on remedies involving violations of Article 36 of Vienna Convention on Consular Relations, 39–40, 42, 46, 47
statute of, Article 38, 653, 654
International Covenant on Civil and Political Rights (1966), 194–195, 266, 317–318, 345–346, 388, 973, 975
jurisdiction, 461–462
U.S. state law and, 194–195
International Covenant on the Elimination of All Forms of Racial Discrimination (1984)
U.S. state law and, 195
International Criminal Court, 61–62, 295
Article 98 Agreements, 68–69, 165–168, 169
Organization of American States' resolution, 321–323
references to, in multilateral conventions and resolutions, 302, 318–323
United Nations Security Council and, 150, 151–152, 159–161, 322, 907–909

International Criminal Court (*continued*)
United Nations General Assembly Resolution *57/214,* 318–320
United Nations Security Council Resolution *1422,* 157, 161–165
U.S. policy, 148–161, 162–164, 164–165, 303, 321–323
U.S. prohibition on cooperation with, 168–175
International Criminal Tribunal for Rwanda, 137–142, 975
International Criminal Tribunal for Yugoslavia, 138, 142–147, 975
International Emergency Economic Powers Act, 95, 96–97, 98, 100, 412, 577, 883
International Institute for the Unification of Private International Law (UNIDROIT), 818, 820–821, 822–823, 825, 827, 828–829
International Labor Organization
child protection convention, 286–287, 288, 289
instrument for amendment of Constitution of, 192–193
U.S. state law and, 192–193
International Maritime Organization, 104–105
protection of particularly sensitive sea areas, 788–790
International organizations
diplomatic immunity of missions and personnel, 536, 537, 555–560, 570–573
See also specific organization
International Organizations Immunities Act, 536, 555–556*n,* 572–573
International Parental Kidnapping Crime Act, 56–59
International Refugee Organization, 7
International Religious Freedom Act (1998), 280–282
International Treaty on Plant Genetic Resources for Food and Agriculture, 810–811
Interstate Commerce Commission Termination Act (1995), 666
Inviolability
of diplomatic personnel, 550–552
of diplomatic premises, 37
of head of state, 550–552
Iran, 282, 410, 1065
claims arising from hostage taking, 523–527
immunity
under Foreign Sovereign Immunities Act, 519–522
terrorism exception, 522–534
liability of Iranian Bank in U.S. for government actions, 545–547
private right of action to recover compensation for expropriation, 219–226
See also Algiers Accords
Iran-Iraq Arms Non-Proliferation Act (1992), 1070–1071
Iran Nonproliferation Act (2000), 1067–1069
Iran–United States Claims Tribunal, 632

Iraq, 282, 1065
claims against, related to Kuwait invasion, 407–408
Oil-for-Food program, 894–897
U.S. military action against
congressional authorization for, 933–937
United Nations resolutions and, 937–947, 956–957
Iraq Liberation Act (1998), 934
Ireland, mutual legal assistance treaty, 61, 62, 67
Israel
conflict resolution efforts, 910–911, 913–919
Jerusalem, U.S. policy, 243
preemptive military action, 955–956
sovereign immunity for private company indirectly owned by, 481, 488
Italy
cooperation in anti-terrorism actions, 890
Open Skies (aerial observation) treaty, 1029
service of process in, 877–879

J

Jamaica
illicit drug production or transit, 124
Open Skies agreement, 597
Japan
claims of Korean "comfort women" against, 494–503
claims of World War II-era prisoners against, 434–461
North Korea and, 1050–1051
Joint Declaration for Cooperation to Combat International Terrorism (U.S.–ASEAN), 118–119
Judicial assistance, for prosecution of war crimes in Yugoslavia, 144–145
Judicial procedure
access of U.S. citizens to Cuban courts, 237–242
extradition to countries with judiciary system deficiencies, 72–73
military commissions for trial of certain non-U.S. citizens, 957–976
See also Evidence
Jurisdiction
agency or instrumentality of foreign state, 488–490
Alien Tort Claims Act, 323–324, 325–326, 328–329, 333–343, 344, 346, 352–355
alienage diversity statute, 227–231
claims by former U.S. employees in Vietnam, 413
deference to foreign courts in concurrent civil litigation, 859–864
enforcement of foreign tax claims, 837–841

Jurisdiction (*continued*)
over extraterritorial criminal offenses, 131–137, 421, 422–423, 454
habeas proceedings by non-U.S. citizens detained abroad, 980–986
immunity of agents and instrumentalities of U.S. government, 245–246
Indian Claims Commission Act, 378
Inter-American Commission on Human Rights, 369
authority to issue precautionary measures, 261–269, 1008–1017
not including law of war, 1008–1017
International Covenant on Civil and Political Rights, 461–462
International Criminal Court, 150–161, 162–163, 908–909
military commissions for trial of non-U.S. citizens suspected of terrorism, 959
passive personality principle, 132–133
Protocol on the Sale of Children, Child Pornography and Child Prostitution, 298
recognition and enforcement of foreign arbitral awards, 873–875
in rendition of alien defendant from Pakistan, 77–78
See also Foreign Sovereign Immunities Act
Jus cogens, Foreign Sovereign Immunities Act and, 468, 491–494, 501
Justice for United States Prisoners of War Act (proposed), 456–460

K
Kazakhstan, 574, 757
Kenya, claims arising from bombing of U.S. embassy in, 461–462
Kiribati, environmental protection agreement, 791
Korea
Korea, Republic of (South Korea)
on situation in North Korea, 1050
U.S. air services agreements, 601, 603–604
World War II-era claims against Japan, 444–446, 456
Korea, Democratic Peoples Republic of (North Korea), 282, 1065
missile proliferation sanctions against, 1066–1067
refugees from, 35–38
shipment of missiles to Yemen, 1052–1057
violation of nuclear weapons agreement, 1044–1052
Kosovo, 903
Kuwait, reparations owed by Iraq to, 407–408, 944, 945
Kyrgyzstan
cooperation in anti-terrorism actions, 890
Open Skies (aerial observation) treaty, 1029

L
Labor issues, child labor, 286–287
Lao People's Democratic Republic
  anti-terrorism cooperation, 118
  illicit drug production or transit, 124
Latvia, 757
Law enforcement
  denial of passport for purposes of, 18
  designation of money laundering concerns, 126–131
  Europol–U.S. agreement on transfer of personal data, 80–84, 467–469
  extraterritorial arrest, 346
  G8 recommendations, 121–122
  need for international cooperation, 62–63
  Organization of American States agreements, 117
  refusal of international mutual legal assistance in capital cases, 69–70
  return of stolen vehicles or aircraft, 61, 62, 64–65
  vs. military action, in anti-terrorism effort, 904, 906
  See also Extradition, Mutual legal assistance
Law of the sea, *see* Maritime operations
Law of war
  allocation of war powers in U.S. Constitution, 987–989, 990–991
  command responsibility, 348–351
  human rights law and, 1009–1011, 1013–1017
    IACHR not competent to apply, 1008–1017
  preemptive military action, 947–957
  self-defense, 951, 953–956
  use of force against Iraq
    U.S. congressional authorization for, 933–937
    UN resolutions and, 937–947
  See also Armed conflict; Enemy combatants; Geneva Conventions
Lebanon, 757
Libya, 534, 1065
  involvement in Pan Am Flight 103 bombing, 111–112
  tax lien against property of, 576–579
Liechtenstein, mutual legal assistance treaty, 61, 62, 67
Lithuania, 61, 62, 63–64, 69
  extradition treaty, 175
  naturalization treaty, 203
Luxembourg, Open Skies (aerial observation) treaty, 1029

M
Macau, 757
Magnuson–Stevens Fishery Conservation and Management Act, 190
Malaysia, anti-terrorism cooperation, 118
Mali, cultural property protection agreement, 813
Malta, 134–137, 203–204
Marine Mammal Protection Act, 795, 801, 802
Maritime Drug Law Enforcement Act (2002), 134–137
Maritime operations
  anti-terrorism provisions of Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 104–110
  crime occurring on high seas, 133–137
  limits of continental shelf, 732–737
  protection of particularly sensitive sea areas, 788–790
  right to control submerged lands
    of Commonwealth of the Northern Mariana Islands, 246–259
    as historic inland waters, 738–747
    as juridical bays, 738–739, 747–756
  rights of innocent passage, 740–741, 753
  stop and search of unflagged vessel, 1052–1054, 1056
  territorial sea limits, 255–259
  U.S. jurisdiction in crime committed in Mexican territorial waters, 131–133
  U.S.–Pacific Islands States agreement on fishing rights, 189–190
  warning regarding military aircraft wreckage in international waters, 737–738
Marshall Islands, environmental protection agreement, 791
Mauritius, 737–738
Memorandum of Understanding
  Concerning Cooperation in Fisheries and Aquaculture, 796–798
  provisional application of treaty amendments through, 186–190
Mexico
  agreement on allocation of Rio Grande waters, 757–759
  clemency requests for Mexican nationals in U.S. custody, based on lack of consular notification, 39–52
  extraterritorial arrest in, 346
  illicit drug production or transit, 124
  international child abduction, 54–56
  life imprisonment assurances request in extradition from, 73–74
  Presidential permits for construction and maintenance of U.S. border facilities, 607
  private right of action to challenge U.S. treaties with, 212–218
  regulation of cross-border motor carriers, 666–670

smart-border plan, 121
U.S. jurisdiction in crime committed in Mexican territorial waters, 131–133
Micronesia, 757
environmental protection agreement, 791
Micronesian Claims Act (1971), 985
Migration Accords, U.S.–Cuba, 20–22
Military commissions for trial of certain non-U.S. citizens, 957–976
Military personnel
International Criminal Court jurisdiction, 152–153, 157–161, 162, 323, 908–909
American Servicemembers' Protection Act provisions, 168–175
recruitment age, 287–288, 295, 296
Minimum standard of treatment of aliens, 611–616
Moldova, sanctions against companies trading with Iran, 1069
Montenegro, unblocking of blocked assets of, 897–900
Montreal Inter-carrier Agreement (1966), 605
Montreal Protocol on Substances that Deplete the Ozone Layer, 777
Montreal Protocols to Convention for the Unification of Certain Rules Relating to International Carriage by Air (1975), 603–604, 605
Morocco, free trade agreement negotiations, 722–723
Motor vehicles
recognition of foreign driver's license, 18–20
stolen vehicle treaties, 61, 64–65, 68
Mutual legal assistance
benefits of, 65–66, 74
in death penalty cases, 69–70
under Inter-American Convention Against Terrorism, 115–116
International Criminal Court and, 168–171, 174
investigation of human rights abuses in Argentina, 270–271
new treaties, 61, 62–63, 65, 66–67, 69–70, 74–76, 79
political offense exceptions, 109
Myanmar
anti-terrorism cooperation, 118
citizens of Myanmar's claim against U.S. corporation under Alien Tort Statute, 343–344

N

NAFTA Implementation Act, 694–695
Namibia, 757
Narcotics Control Trade Act (1974), 125
National Emergencies Act, 883, 884, 1039
National Environmental Policy Act, 670

National Industrial Transportation League, 831
National security
allocation of responsibilities in U.S. Constitution, 987–989
authority of executive branch to withhold information based on, 243
claims to submerged lands by U.S. state and, 740–741, 754–756
congressional authorization for U.S. military action against Iraq, 933–937
dual nationality of U.S. consular and diplomatic employees, 1–4
International Criminal Court and, 908
preemptive military action in self-defense, 947–957
smart-border plan, 121
Nationality
continuous nationality requirement for claims, 395, 626–632
dual, 1–4
equitable *vs.* nominal ownership of claims, 634–636
transfer of international claims to corporate entity, 636–640
See also Citizenship
Natural resources
transboundary sharing, 396
See also Environmental protection; Fisheries management; Water use agreements
Nauru
designation as money laundering concern, 127, 130
environmental protection agreement, 791
Netherlands, 204
Open Skies (aerial observation) treaty, 1029
reciprocity in recovery of family support obligations, 841–842
Netherlands Antilles, 204
New Zealand, environmental protection agreement, 791
Nicaragua, 202
naturalization convention, 204
Nigeria, 757
citizens' claim against European corporations for human rights violations, 352–355
illicit drug production or transit, 124
Niue, environmental protection agreement, 791
Nonproliferation
debt forgiveness for Russian spending on nonproliferation, 1042–1044
International Code of Conduct against Ballistic Missile Proliferation, 1062–1065
Iran Nonproliferation Act, 1067–1069
Iran-Iraq Nonproliferation Act, 1070–1071

Iraq sanctions program, 894–896
North Korean violation of nuclear weapons agreements, 1044–1052
sanctions to prevent proliferation of weapons of mass destruction, 1039, 1066–1073
Treaty for the Prohibition of Nuclear Weapons in Latin America, 185–186
Yemeni compliance with agreements, 1054–1055
See also Arms control
North American Free Trade Agreement
Articles:
1003, 646
1024, 645–646
1101, 619–623, 647
1102, 611, 617, 624, 642, 643, 646–648, 662, 665
1105, 609, 611–616, 617, 624, 642, 648–659, 660, 662
1106, 642
1108, 642, 644, 645
1110, 611, 617, 624
1116, 611, 631, 648, 651, 654, 660, 662–663
1117, 611, 630, 631, 640–641, 648, 654
1120, 648
1131, 626–627
1136, 631, 651
1139, 630, 631
1222, 620–621
1502, 654, 662–665
Chapter 11 arbitrations
anti-competitive practice claims against Canada, 661–665
claims for possible future breaches, 648
continuous nationality requirement, 624–641
expropriation, 617, 623–624
Free Trade Commission interpretation and, 611–614, 651–652, 660
immunity of U.S. municipal agency from claims of tortious interference, 607–609, 614–616
loss of continuous nationality after corporate reorganization, 624–641
minimum standard of treatment of aliens, 611–616, 623–624, 642, 648–659
national treatment requirements, 621–624, 642, 643–644, 645, 646–648
performance requirements, 642, 645
power to rule on objections relating to admissibility, 618–619
procurement by state of United States, 642–646
treaty responsibility prior to entry into force, 609–611

North American Free Trade Agreement (*continued*)
Chapter 15 claim, 662–665
Chapter 20 arbitration, 651, 663
regulation of crossborder motor carriers, 666–670
Northern Mariana Islands, control of submerged lands, 246–259
Norway, 210
coastline definition, 751–752
naturalization convention, 205
Open Skies (aerial observation) treaty, 1029
reciprocity in recovery of family support obligations, 841–842
Nuclear Nonproliferation Treaty, 945, 1032–1033, 1034
International Atomic Energy Agency Additional Protocol, 1034, 1046, 1051, 1057–1062
North Korean compliance, 1045–1046, 1047, 1052
review conference, 1071–1073
Nuclear technology
North Korean program, 1044–1052
transfer of Serbian uranium stocks to Russia, 1041–1042
Treaty for the Prohibition of Nuclear Weapons in Latin America, 185–186
U.S.–Russia arms control agreements, 1017–1023
nuclear material protection, 1039–1041, 1042–1044
See also Nonproliferation
Nuremberg Code, 345–346

O

Oman, 757
Omnibus Consolidated and Emergency Supplemental Appropriations Act (1999), 21
Organization for Economic Cooperation and Development, 307
guidelines for multinational enterprises, 727–728
tax systems, 685–687
Organization for Security and Cooperation in Europe, 316, 1030
Organization for the Prohibition of Chemical Weapons, 1033–1035
Organization of American States
Charter, 192, 263, 369
U.S. federalism reservation, 192
draft declaration on rights of indigenous people, 364–367, 379–381
Inter-American Convention Against Terrorism, 112–117
law enforcement treaties, 117
references to International Criminal Court in resolution of, 321–323

Specialized Conference on Private International Law (CIDIP)
secured financing law, 823, 833–834
transboundary pollution agreement, 833, 834
transportation regulation, 819–820, 834
stabilization efforts in Haiti, 926–931
See also Inter-American Commission on Human Rights
Outer Continental Shelf Lands Act, 739–740
Outer space law, 759–760, 828–829
"launching state" concept, 762–763
registration of outer space objects, 760–761, 762–763
status of international treaties, 760–761
use of nuclear power, 761
Outer Space Treaty (1967), 759

P
Pacta sunt servanda principle, 661
Pakistan, 282
individual rendered to U.S. by, 77–78
illicit drug production or transit, 124
Palestine, 244
conflict resolution efforts, 910–919
Panama, 68
illicit drug production or transit, 124
Panama Canal Treaty. *See* Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (1977)
Papua New Guinea, 574–575
citizens' claim against international corporation under Alien Tort Claims Act, 333–343, 357
environmental protection agreement, 791
Paraguay, illicit drug production or transit, 124
Paramount rights doctrine, 248–255
Paris Convention for the Protection of Industrial Property, 389–391
Passports
denial of
grounds for, 16, 17–18
for law enforcement purposes, 18
to persons owing child support arrearages, 13–15
to persons with mental illness, 18
two-parent consent for passport issuance to child, 11–13
for U.S. citizen escaped from foreign custody, 16–17
Patent law
drug research and development, 718
parallel judicial proceedings, 862–863, 872–873
Peacekeeping, 152–153, 157–168, 903

Persecution
claims by Falun Gong practitioners against Chinese government officials, 469–476
definition, 26
denial of visa based on participation in, 5–8
fear of, as basis for asylum request, 26–28
religious, 280–282
of returned asylum-seekers, 29
Zimbabwean citizens claim against Zimbabwean political party under Torture Victims Protection Act, 324–333
Personal Responsibility and Work Opportunity Reconciliation Act (1996), 13–15
Peru, 61, 62, 63, 69
citizens' claim against U.S. corporation under Alien Tort Claims Act, 344–345
cultural property protection agreement, 813
extradition treaty, 175
illicit drug production or transit, 124
judiciary system, 72–73
naturalization convention, 205
Philippines, anti-terrorism cooperation, 118
Poland
claims arising from post-World War II expropriation, 492–494, 513–516
Open Skies (aerial observation) treaty, 1029
Political crimes, terrorist acts and, 109, 114–115
Portugal
naturalization convention, 205
Open Skies (aerial observation) treaty, 1029
Prisoner transfer
proposed amendment to Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 110
temporary, for mutual legal assistance, 64, 110, 116
Prisoners of war
in World War II-era Japan, 434–461
See also Geneva Conventions, Enemy combatants
Privacy
constitutionality of California law requiring disclosure of European insurance information, 423–425
of embassy data, 567–570
Europol–U.S. agreement on transfer of personal data in law enforcement, 80–84
Privacy Act (1974), 234

Private international law
civil litigation
anti-suit injunctions in concurrent proceedings, 864–873
comity-based abstention from jurisdiction, 859–864
discovery for use in foreign tribunal, 875–877
enforcement of foreign arbitral awards, 873–875
service of process abroad, 877–879
commercial law
bills of lading, 819–, 833–834
cross-border insolvency, 821–822, 828
electronic commerce agreements, 820, 834–837
enforcement of foreign tax claims, 837–841
finance standards, 818–819
financing of international projects, 821
franchising regulations, 820–821
secured transactions, 818–819, 822–829
cooperation among national bar associations, 822
family law
international recovery of family support obligations, 841–858
Hague Conference on, 817–818, 826
identification of parallel judicial proceedings, 860–861
transportation issues, 819–820, 829–833, 834
Property rights
protection of diplomatic and consular property, 37, 410, 411, 412
See also Intellectual property
Protocol Additional to the Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America, 1034, 1057–1062
Protocol on Exchange of Instruments of Ratification, 79
Protocol Relating to the Status of Refugees, 32, 37, 185, 289
Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 600–607
Protocol to the Treaty Between the United States and USSR, 181
Public health
abortion policies, 770
cloning technology, 807–809
disease prevention initiatives, 715–718, 805–807

R

Racial discrimination
Alien Tort Claims Act jurisdiction, 338–339
UN resolutions against, 271–275
U.S. policies, 271–275

Racketeer Influenced and Corrupt Organizations (RICO) Act, 837–838, 839–840, 841
Reciprocity
access to courts in foreign country as prerequisite for jurisdiction in U.S. courts, 237–242
in diplomatic immunity practices, 566–567
permission for aliens to perform long-shore work, 756–757
private right of action to challenge treaty, 224
in recovery of family support obligations, 841–858
service of process on visiting foreign officials and, 592–593
Refugees
Agreement for Cooperation in the Examination of Refugee Status Claims from National of Third Countries, 31–35
asylum applicants in third countries, 30–31
Convention Relating to the Status of Refugees (1951), 185, 198, 289
Protocol (1967), 32, 37, 185, 289
detention of, 29–30
Haitian, 25–31
identification and protection, 26–28
North Korean, 35–38
Vietnamese Montagnards in Cambodia, 24–25
Religious freedom
claims by Falun Gong against Chinese government officials, 469–476
State Department Country Reports, 280–282
Religious Freedom Restoration Act, 98, 99
Repatriation of Vietnamese Montagnards in Cambodia, 24–25
Resource Conservation and Recovery Act, 775
Retroactive application of Foreign Sovereign Immunities Act, 494–513, 516
Romania
International Criminal Court Article 98 Agreement, 166
Open Skies (aerial observation) treaty, 1029
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1999), 776
Russia, 757
agreement concerning documentation of U.S.–Soviet Relations, 227
agreement on protection of polar bears, 800–805
arms control agreements, 1063
ABM & START II Treaties, 1027–1028
Joint Declaration on New Strategic Relationship, 1023–1027
pre-launch notification, 1064–1065

Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions (2002), 1017–1023
debt forgiveness for spending on nonproliferation, 1042–1044
Executive Order blocking attachment of Russian property relating to the downblending of Russian uranium stocks, 1039–1041
Israeli–Palestinian conflict resolution efforts, 916–919
limits of continental shelf, 732–737
mutual legal assistance treaty, 79
Open Skies (aerial observation) treaty, 1029
transfer of Serbian uranium stocks to, 1041–1042
Russian Federation Debt for Nonproliferation Act (2002), 1042–1044
Rwanda, International Criminal Tribunal for, 137–142

S
Sanctions
blocking of Libyan property in U.S., 576–579
against Chinese companies, 1067–1071
executive branch foreign affairs authority, 244
Iraq Oil-for-Food program, 894–897
against North Korean company, 1066–1067
on Palestinian organizations, 244
to prevent proliferation of weapons of mass destruction, 1039, 1066–1073
role of U.S. states, 446
terrorism-related
Afghanistan, arms trade with, 884–885
against al-Qaida, 883, 885, 887–888, 889–890
asset freezing, 94–101
foreign terrorist organizations, 85–94, 102–104
international cooperation in disruption of financing, 888–893
money laundering, 162–131
narcotrafficking, 122–126
against Taliban-controlled assets, 881–884, 887–888, 889
UN de-listing procedures, 886–887
in United States
UN Resolutions, 885–890
third-state consequences, 391–392
unblocking of blocked assets of Yugoslavia (Serbia and Montenegro), 897–900
Saudi Arabia, 282
cooperation in anti-terrorism actions, 889
inviolability of embassy documents, 567–570

Sentencing of convicted persons
  life imprisonment assurances in extradition treaties, 70, 73–74
  See also Capital punishment
September 11 terrorist attacks, 106, 112–113, 902, 904, 935, 937, 951, 953, 973, 1011–1012, 1025
  victim compensation fund, 408, 409
Serbia
  transfer of uranium stocks to Russia, 1041–1042
  unblocking of blocked assets of, 897–900
Service of process
  procedures of military commissions for trial of non-U.S. citizens suspected of terrorism, 966
  on visiting foreign officials, 581–595
Service of process abroad
  by mail abroad, 877–879
Sexual harassment, immunity under FSIA from claims of, 477–478
Seychelles, 133
Sierra Leone, Special Court in, 147–148, 322–323
Singapore, 757
  anti-terrorism cooperation, 118
  cooperation in anti-terrorism actions, 890
  free trade agreement, 723
Slovak Republic
  naturalization treaty, 203
  Open Skies (aerial observation) treaty, 1029
Solomon Islands, 190
  environmental protection agreement, 791
South Africa, domain name ownership case, 518–519
South African Customs Union, 722–723
South Pacific Tuna Act (1988), 190
Sovereignty, U.S.
  claims over submerged lands, 743–747
  International Criminal Court as threat to, 152, 322
  paramount rights doctrine, 248–255
  status of Guantánamo military base in Cuba, 983–986
  submerged lands in Commonwealth of the Mariana Islands, 246–259
  of unincorporated territories, 249–250
Spain, Open Skies (aerial observation) treaty, 1029
St. Christopher and Nevis, 757
Standing
  of members of Congress in case involving President's termination of treaty, 198–199
  private right of action to challenge treaties, 212–218

START. *See* Treaty on the Reduction and Limitation of Strategic Offensive Arms
States of U.S.
  authority to impose sanctions against foreign government, 446
  capital punishment policy and practice, 316–318
  claims to submerged lands, 738–756
  dismissal of claims against Japan by World War II-era prisoners, 434–456
  expropriation claims under NAFTA for legislative actions of, 616–623
  international agreements and, 182, 190–198, 290–291
  prohibition on extraterritorial regulation by, 421–425, 436, 453–456
  right to control submerged lands, 248–249
  treaty obligations, 642–646
Statute of limitations, in U.S. Court of Claims, 460–461
Statute of Rome. *See* International Criminal Court
Strategic Arms Reduction Treaty. *See* Treaty on the Reduction and Limitation of Strategic Offensive Arms (START)
Sudan, 282, 757
  civil war resolution efforts, 919–925
Sudan Peace Act (2002), 922–925
Sweden
  cooperation in child abduction cases, 75–76
  extradition treaty, 75
  mutual legal assistance treaty, 61, 62, 67, 74–76
  naturalization convention, 205
Switzerland
  cooperation in anti-terrorism actions, 893
  Holocaust victims' compensation agreements, 417, 427, 428
  injuries sustained on embassy grounds, 522
Syria, 757

T

Taipei Economic and Cultural Representative Office in the United States, 79, 535–545, 796–798
Taiwan, 245
  immunity of cultural center from personal injury suit, 535–545
  UN participation, 405
Taiwan Relations Act, 79, 536
Takings exception to sovereign immunity
  under FSIA, 513–516
  of United States, 460–461

Tariffs
agriculture, 704–705
steel, 693–697
U.S. proposal to eliminate, 698–701
Taxation
agricultural trade reform proposal to WTO, 703
enforcement of foreign tax claims, 837–841
immunity of diplomatic property, 576–581
sovereign immunity from claims related to, 534–535
territorial systems, 685–687
World Trade Organization dispute on foreign sales corporation provisions in U.S. tax law, 677–693
Telecommunications
communication of treaty reservation, 394
domain name registration
Paris Convention for the Protection of Industrial Property and, 389–391
using name of sovereign country, 518–519
Telecommunications Act (1996), 284
Terrorism
anti-terrorism provisions of Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 104–110
Asia Pacific Economic Cooperation forum statement, 119–121
authorization of use of force against Iraq and, 933, 935, 937
border controls, 121
claims arising from bombing of U.S. embassy in Kenya, 461–462
definition of terrorist activity, 87–88, 102–103, 411–412
designation of terrorist organizations, 95–96, 412–413
constitutional challenges, 93–94, 98–101
criteria for, 85–89, 102–103
delisting procedures, 101
effects, 89–90
historical development, 90
immigration exclusion list, 102–104
international cooperation in, 889–890
legal ramifications, 89
litigation by designated organizations, 91–92
Specially Designated Global Terrorist status, 91–92, 97, 98
UN procedures, 886–887, 889
enemy combatants suspected of, 904–905
designation, 990–997, 998–1000, 1001–1008
U.S. citizens, 996–997
habeas corpus litigation, 980–1000

Lindh case, 1001–1008
legal status, 904–905, 976–980
exception to sovereign immunity and, 466, 471, 472, 522–534
freezing of assets of designated terrorist organization chartered in U.S., 94–98
G8 counter-terrorism recommendations, 121–122
human rights protection and, 358, 360, 387–388
Inter-American Convention Against Terrorism, 112–117
liability of government for actions of its employees or agents, 531
Libyan involvement in Pan Am Flight 103 bombing, 111–112
political offenses and, 109, 114–115
preemptive military action in response to imminent threat and, 947–957
procedures of military commissions for trial of non-U.S. citizens suspected of, 957–976
provision of material support or resources for, 89, 93–94, 95, 115, 529
international cooperation in disruption of, 888–893
refusal of mutual legal assistance in capital cases, 69–70
religious-based, 282
review of International Maritime Organization instruments for protection against, 104–105
role of international law in prosecuting or preventing, 902, 904
Russia–U.S. Joint Declaration on New Strategic Relationship, 1025
sanctions related to
Afghanistan, arms trade with, 884–885
against al-Qaida, 883, 885, 887–888, 889–890
international cooperation in disruption of financing, 888–893
against Taliban, 881–884, 885, 887–888, 889
U.S.–ASEAN Joint Declaration for Cooperation to Combat International Terrorism, 118–119
victim compensation, 244–245, 408–413
Terrorism Risk Insurance Act (2002), 410
Thailand
anti-terrorism cooperation, 118
illicit drug production or transit, 124
Tonga, 757
environmental protection agreement, 791
Tort, exception to sovereign immunity, 472, 522
Torture
Convention Against Torture, 313, 315
Draft Optional Protocol, 313–315
customary international law, 353

Torture Victims Protection Act (1992), 563
citizens of Indonesia claim against U.S. corporation under, 357–363
command responsibility as basis for liability under, 348–351, 470
exhaustion of remedies provision, 336
immunity of government official, 470–472, 474–475, 563
indirect participation liability in violations of, 351–355
purpose, 324
state action requirement, 352–355
Zimbabwean citizens claim against Zimbabwean political party under, 324–325
Toxic Substances Control Act, 775, 776, 777
Trade
Cambodia–U.S. textile agreement, 725–726
conflict diamonds, 728–729
Enhancing Secure Trade in the APEC Region, 120
Export-Import Bank reauthorization, 726–727
free trade agreement negotiations, 722–725
trade promotion authority, 719–722
See also Arms trade; North American Free Trade Agreement; World Trade Organization
Trade Act (1974), 261, 694, 695, 696, 719
Trade Act (2002), 719, 722
Trademark Act (1946), 673, 676
Trademark law
domain name registration
Paris Convention for the Protection of Industrial Property and, 389–391
use of names of sovereign countries, 518–519
World Trade Organization case challenging U.S. trademark law, 672–676
Trading With the Enemy Act (1917), 412, 674
Transfer of prisoners. *See* Prisoner transfer
Travel restrictions
denial of passport to person owing child support arrearages, 13–15
Treaties
arms control agreements, 180–183, 1017–1039
authority to interpret, 440, 460, 1001
authority to withdraw from, 198–202
capacity to make, 177
competence of European Union member states to conclude air services agreements, 598–600
Constitutional requirements, 178–179
customary international law and, 658

executive branch authority, 242–243, 440, 1001
private right of action
as distinct from self-executing, 221–222
claims against Iran for expropriation, 219–226
Mexican workers' claims against U.S., 212–218
ratification of protocols of convention without ratification of underlying convention, 183–186
reservation practice, 206–212, 393–394
terminated by President, 202–206
U.S. state and, 190–198
vs. other international agreements, 177–179
See also Treaties, specific; Vienna Convention on the Law of (1969) under Conventions
Treaties, specific
Conventional Armed Forces in Europe, Treaty on (1990), 182, 296, 300
Fisheries, Treaty on Between the Governments of Certain Pacific Islands States and the Government of the United States of America (2002), 186–190
Friendship, Commerce, and Navigation with Nicaragua, Treaty of, 202, 204
Germany, Treaty on the Final Settlement with Respect to (1990), 182
Nonproliferation of Nuclear Weapons, Treaty on the, 1025
Nuclear Weapons in Latin America, Treaty for the Prohibition of (1967), 185
Open Skies (aerial observation), Treaty on, 1028–1032
Panama Canal, Treaty Concerning the Permanent Neutrality and Operation of the (1977), 181, 185–186
Peace Between Japan and U.S., Treaty of, 435–440, 444–447, 458–460, 495
Strategic Offensive Arms, Treaty on the Reduction and Limitation of (1991) (START), 1017, 1019, 1021
Strategic Offensive Arms, Treaty on the Reduction and Limitation of (1993) (START II), 1021–1022, 1027–1028
Strategic Offensive Reductions, Treaty Between the United States of America and the Russian Federation on (Moscow Treaty, 2002), 1017–1023
See also Agreements, Conventions, International Covenants
Tropical Forest Conservation Act, 780
Turkey, 105, 757
Open Skies (aerial observation) treaty, 1029
Turkmenistan, 282
Tuvalu, 757

U
Uganda, Open Skies agreement, 597
Ukraine
  designation as money laundering concern, 127–128, 130
  Open Skies (aerial observation) treaty, 1029
UNIDROIT, 818, 820–821, 823, 825, 827, 828–829
Union of Soviet Socialist Republics, 210
  ABM treaty, 198–202, 205
  U.S.–Russia agreement concerning documentation of U.S.–Soviet Relations, 227
United Arab Emirates, 757
United Kingdom, 210
  citizenship status of British Virgin Islands' corporations, 229–230
  Open Skies (aerial observation) treaty, 1029
  parallel judicial proceedings, 859–862, 868–871
United Nations
  antidiscrimination
    persons with disabilities, 283
    racism, 271–275
    women's rights, 277–280
  arms control compliance monitoring, 1032–1035
  Bosnia-Heregovina peacekeeping mission, 157–161
  Charter, 152, 161, 164, 391–393, 554, 555, 559, 953–954
  Commission on International Trade Law (UNCITRAL), 818, 819–820, 821–822, 823, 825–826, 827, 829–833, 834–837
    Arbitration Convention, 618–619, 620–621
  Convention. *See* Conventions
  Education, Scientific and Cultural Organization (UNESCO), 403–405
  financial management, 399–403
  General Assembly Resolutions:
    57/178, 280
    57/189, 304
    57/190, 302–303, 304
    57/194, 274–275
    57/195, 274–275
    57/199, 314–315
    57/214, 318–320
    57/215, 320
    57/219, 387–388
    57/226, 311
    57/233, 320
    57/299, 283–285
  Headquarters Agreement, 554, 555–557, 559–560, 561, 577

High Commissioner for Human Rights, 273
High Commissioner for Refugees, 24, 29, 31, 36, 37
Human Rights Committee, 265–267
immunity of representatives and missions, 552–567, 570–573, 576–579
indigenous people, draft declaration on rights of, 363
International Criminal Court and, 150, 151–152, 157, 159–165, 171–173, 322, 907–909
International Criminal Tribunal for Rwanda, 137–142
International Criminal Tribunal for Yugoslavia, 138, 142–147
International Law Commission, 393–396
Iraq disarmament effort, 934, 937–947, 956–957
Iraq sanctions program, 894–897, 907
Israeli–Palestinian conflict, resolutions on, 914–915, 919
Mission in Support of East Timor, 157–158
peacekeeping role, 903, 907, 908–909
Population Fund, 308–309
Second Transitional Government in East Timor, 177
Security Council Resolutions:
649, 934
660, 934, 956–957
661, 934
662, 934
664, 934
665, 934
666, 934
667, 934
669, 934
670, 934
674, 934
677, 934
678, 934, 937, 938, 944, 956–957
686, 944
687, 407–408, 934, 944–945, 957
688, 934, 945
692, 407–408
949, 934
1267, 101, 119, 881, 885, 886–887, 888, 889
1325, 276
1333, 881, 885, 889
1368, 906
1373, 119
1390, 119, 885, 889
1409, 894–895, 896–897

United Nations (*continued*)
1422, 157, 161–165
1441, 937–940, 957
1452, 887–888
1454, 895–897
Sierra Leone Special Court, 147–148
Special Session on Children, 300–302
Taiwan's status in, 405
U.S. financial commitments, 396–403
women's issues
antidiscrimination efforts, 277–280
security during armed conflict, 275–276
World Conference Against Racism/Durban declarations, 271–274, 275–276
United Nations Participation Act, 412, 883
Universal Declaration on Human Rights, 302, 310, 727
Uruguay, naturalization convention, 205
USA PATRIOT Act (2001), 86–89, 102, 126–127, 128
U.S.–France Air Transport Agreement (1998), 597–598
U.S.–Hong Kong Policy Act, 384–385
U.S.–Iran Treaty of Amity, Economic Relations and Consular Rights, 219–226
Uzbekistan, 282
International Criminal Court Article 98 Agreement, 166–168

V
Venezuela
attempted military coup in, 385–387
illicit drug production or transit, 124
Victim assistance
child victims of sexual exploitation, 288
compensation for victims of terrorism, 244–245, 408–413
Nazi era victims and victims' heirs
constitutionality of California Holocaust Victims Insurance Relief Act, 415–429
insurance settlement agreement, 430–434
Victims of Trafficking and Violence Protection Act (2000), 244–245, 532–533
Vienna Conventions. *See* Conventions
Vietnam, 282, 757
anti-terrorism cooperation, 118
claims by former U.S. employees in, 413–415
illicit drug production or transit, 124
repatriation of Montagnard refugees, 24–25

W
War Claims Act (1948), 458, 461
War crimes
  Alien Tort Claims Act jurisdiction, 337–338
  claim in Bosnia-Herzegovina under Alien Tort Statute, 346–348
  command responsibility, 348–351
  extraordinary chambers in Cambodia, 148
  military commissions for trial of certain non-U.S. citizens, 957–976
  in Sudan, 924–925
War Powers Resolution, 933, 937
Water use agreements, 396
  Mexico–U.S., 757–759
Western Samoa, environmental protection agreement, 791
Women's rights
  antidiscrimination efforts, 277–280
  rights of girl child, 304
  security during armed conflict, 275–276
World Health Organization, 405
World Intellectual Property Organization, 518
World Shipping Council, 831
World Trade Organization
  dispute settlement in, 711–715
    amicus curiae submissions, 714–715
    moratorium on, during health crisis intervention, 715–718
    steel import duties, 693–697
    transparency in, 711–715
    U.S. anti-subsidy law involving steel products, 670–672
    U.S. foreign sales corporation, 677–693
    U.S. trademark law, 672–676
  international tax laws, 677–693
  U.S. proposals to
    agricultural trade reform, 701–707
    export credit reform, 707–711
    request for public comment on U.S. proposals, 697–698
    tariff elimination, 698–701
    transparency in, 711–715
World War II
  Claims related to
    Austrian Jews and descendants for World War II Nazi atrocities, 503–511
    Holocaust victims' insurance claims under California law, 415–434
    Korean "comfort women" in Japan, 494–503
    Persons held as prisoners by Japan, 434–461
  Nazi war criminals, revocation of U.S. citizenship, 5–8

Y
Yemen, North Korean missile shipment to, 1052–1057
Yugoslavia
  Federal Republic of
    sovereign immunity under Foreign Sovereign Immunities Act, 466–467, 491–492
    unblocking of blocked assets of, 897–900
  Former
    1964 agreement with United States resolving disputes, 632
    International Criminal Tribunal for, 138, 142–147

Z
Zimbabwe
  citizens claim against Zimbabwean political party for human rights violations, 324–333
  suspension of entry for certain persons from, 22–24